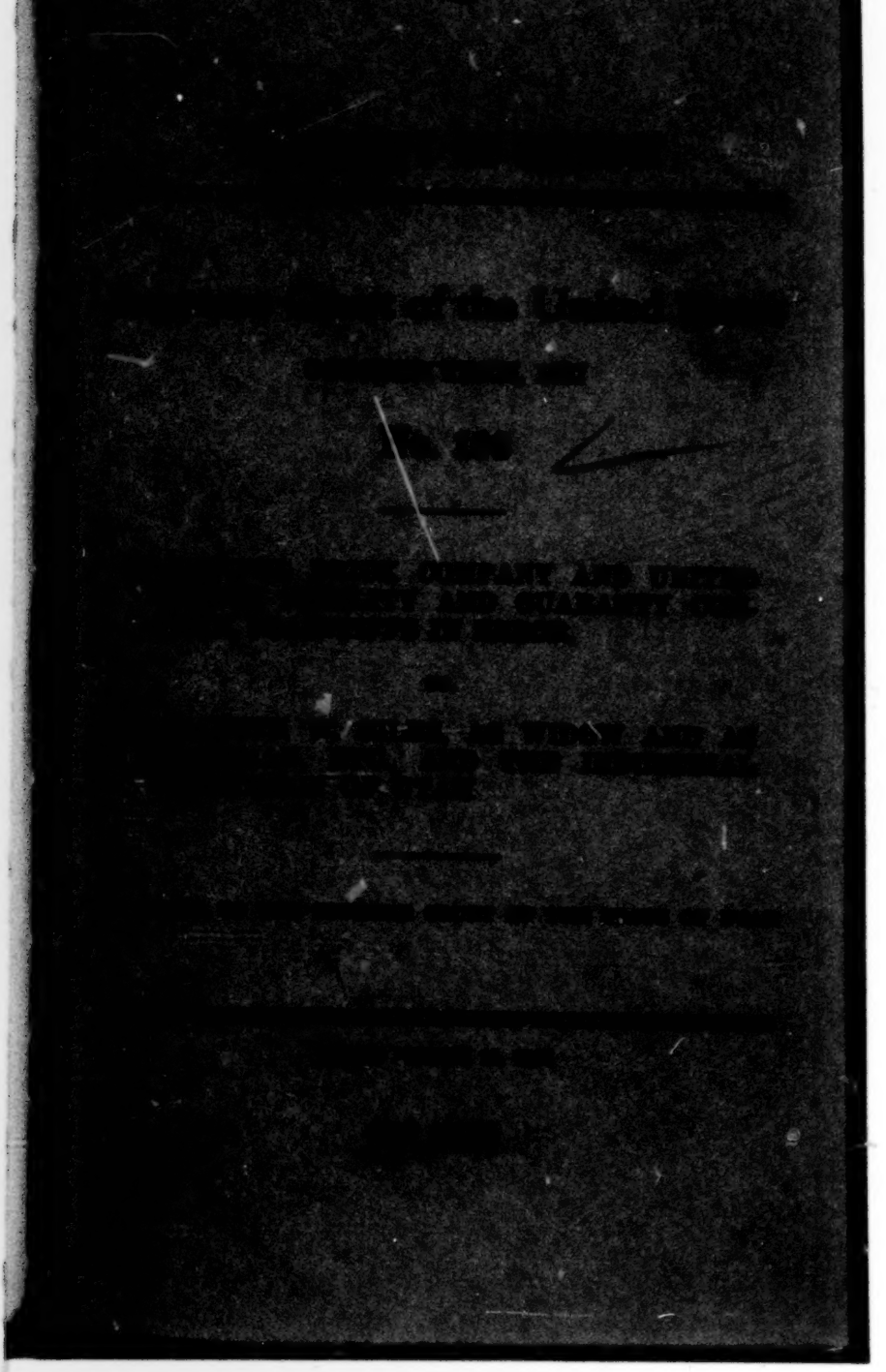

(32,535)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 193

BOUNTIFUL BRICK COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

ELIZABETH W. GILES, AS WIDOW AND AS GUARDIAN, ETC., AND THE INDUSTRIAL COMMISSION OF UTAH

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH

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[fol. 1] **IN SUPREME COURT OF UTAH**

BOUNTIFUL BRICK COMPANY, a Corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Plaintiffs,

v.

THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH and Elizabeth W. Giles, Widow of Nephi Giles, Deceased, for Herself and Alice and Mabel Giles, Daughters of Decedent, Defendants

AFFIDAVIT AND PETITION FOR WRIT OF REVIEW—Filed February 6, 1926

STATE OF UTAH,
County of Salt Lake, ss:

Richard F. Bond, being first duly sworn on oath, deposes and says:

That he now is and at all times hereinafter mentioned was the manager and agent for the State of Utah of the United States Fidelity and Guaranty Company, one of the plaintiffs herein, and that he makes this affidavit as such manager and agent and for and on behalf of the plaintiffs herein, the Bountiful Brick Company and the United States Fidelity and Guaranty Company;

That on the 4th day of August, 1925, Elizabeth W. Giles, widow of Nephi Giles, deceased, for herself and Alice and Mabel Giles, daughters of deceased, filed with the Industrial Commission of Utah her application for adjustment of claim No. 1463, wherein said Elizabeth W. Giles alleges that on the 17th day of June, 1925, Nephi Giles was killed by reason of an accident arising out of or in the course of his employment while regularly employed by John Leddingham, an employer subject to the said Industrial Act, and further alleging that she is the wife of the deceased, and that Alice Giles is a daughter of deceased and was dependent upon him prior to his death and that at the time of the death of decedent she [fol. 2] was over the age of eighteen years, and that Mabel Giles is a daughter of deceased and was dependent upon

the deceased prior to his death and that at the time of the death of decedent she was of the age of fifteen years.

That thereafter upon the hearing of said application the plaintiffs herein appeared by their claims adjuster, Mr. H. F. Benson, resisting the application of the said Elizabeth W. Giles for adjustment of said claim, and denied the right of the said Elizabeth W. Giles to recover adjusted compensation from these plaintiffs;

That after a hearing was had before the Industrial Commission of Utah, defendant herein, upon the adjustment of said claim No. 1463, and on the 24th day of December 1925 the said Industrial Commission rendered its decision, findings of fact, conclusions of law, and decree wherein said Commission concluded and decided that Nephi Giles, deceased, on the 17th day of June, 1925, was killed by an accident arising out of or in the course of his employment by being struck by a Bamberger Electric Railroad Train; that the Bountiful Brick Company is an employer subject to the provisions of the Workmen's Compensation Act; that Elizabeth W. Giles was the lawful wife, and Alice and Mabel Giles were the lawful children of the decedent; and that all were living with him at the time of his death and were wholly dependent upon him for their maintenance and support, and ordered, adjudged and decreed that compensation be awarded to said applicant Elizabeth W. Giles, widow of Nephi Giles, deceased, for herself and Alice and Mabel Giles, daughters of said decedent, be paid by the Bountiful Brick Company or the United State Fidelity and Guaranty Company, in the sum of $8.65 per week for a perio/ of not exceeding 312 weeks beginning with the 20th day of June 1925, and for the further sum of $150.00 to partially defray the expenses of the funeral of the deceased;

That thereafter, the plaintiffs herein Bountiful Brick Company and the United States Fidelity and Guaranty Company filed their petition with the said Industrial Commission, the defendant herein, asking for a rehearing on such decision and award, and on the 13th day of January, 1926, the said Industrial Commission rendered its decision and order denying the petition of the plaintiffs [fol. 3] herein for a rehearing of said cause, and your petitioner and deponent avers and states that said Industrial Commission, in rendering and making its decision and

judgment and awarding compensation as aforesaid, acted, without or in excess of its powers; that said Industrial Commission in so rendering and making its decision, judgment, and award of compensation, as aforesaid, acted irregularly and without authority and in violation of the provisions of Title 49, Compiled Laws of Utah 1917, as amended by the Laws of Utah 1919, Chapter 63; as further amended by the Laws of Utah 1921, Chapter 67, and as further amended by the Laws of Utah 1925, Chapters 73 and 80, and in contravention of Section 1, Article I of the Constitution of the State of Utah and Section 1, Article XIV of the Constitution of the United States, in the following particulars, to-wit:

First. That said decision and award therein are contrary to law;

Second. That the applicant, prior to the award of the Commission, failed to assign her cause of action against the Bamberger Electric Company, or any cause of action arising out of the death of the said Nephi Giles, deceased, to the plaintiffs herein, or either of them;

Third. That the accident which caused the death of the said Nephi Giles did not arise out of or in the course of his employment with the Bountiful Brick Company, one of the plaintiffs herein;

Fourth. That under the facts as shown by the evidence adduced at the hearing of this cause, the injury which caused the death of the said Nephi Giles, deceased, is not compensable under the Workmen's Compensation Act of this State;

Fifth. That at the time of the said injury resulting in the death of the said Nephi Giles, deceased, the relationship of employer and employee did not exist between the said Nephi Giles and the plaintiff herein Bountiful Brick Company;

Sixth. That Section 3113 of the Compiled Laws of Utah 1917, as amended by Laws of Utah 1919, Chapter 63, as interpreted and applied by the defendant, the Industrial Commission of the State of Utah, in making its decision and award therein, contravenes Section 7, Article 1 of the

[fol. 4] Constitution of the State of Utah, and section 1, Article XIV of the Constitution of the United States;

Seventh. That in arriving at its decision and award the said Industrial Commission of the State of Utah, defendant herein, acted upon its own information, to-wit, information obtained from a view of the premises of the defendant Bountiful Brick Company:

Eighth. That there is no competent evidence to support those portions of paragraph one of the findings of fact of the Industrial Commission of the State of Utah, the defendant herein, which read as follows, to-wit:

(a) That this brick plant is located in an isolated spot in the center of what was originally a large tract of land, probably one-half mile square;

(b) That on the east, west, north and part of the south sides of this section of land, individual farms are established and fenced;

(c) That since the establishment of this brick plant on the interior of this tract, the Bamberger Electric Railway Company has acquired a right of way running north and south through the middle of said tract of land;

(d) That the decedent in order to reach the premises of his employer walked along the public highway to the tract of land within which the brick company was located;

(e) That he would use, as far as was practical, the open highways;

(f) The wire fence of the Bamberger Electric Railroad Company right of way had openings on the east side;

(g) And after crossing the tracks entered an improvised gate or small opening on the employer's side of the right of way which was the customary entrance to the premises of the employer;

(h) In selecting this way of approach to and entrance to the employer's premises, the decedent used the most practical and reasonable way of reaching his destination;

(i) And could not otherwise have entered his employer's premises without crossing the Bamberger Electric Rail-

road tracks on the Burns road and proceeding along the railroad tracks a distance of approximately 800 feet to the hole in the fence;

(j) Or walking an unreasonable distance of perhaps one-half or three-fourths of a mile around the south side of the section in the center of which the brick plant was located and enter at about midway on the west side;

(k) So that the eastern entrance which the decedent always used was the only one that did not involve wading through deep weeds and willows and more or less water during certain seasons of the year;

[fol. 5] (l) That there are two elevated dry passage ways running from the plant to the Bamberger Electric tracks;

(m) And the other a path leading to the hole in the fence referred to;

(n) But the so-called gate to which Giles was making his way was always opened;

(o) He was using this way of entrance at the time of the accident;

(p) The decedent used the natural, reasonable and customary route to work;

(q) That what the decedent did was the most natural, reasonable and practical thing he could have done in taking the shorter route and passing through the openings of the fences and entering the premises where a hole was provided or maintained or permitted to be maintained for that purpose;

(r) That the decedent was working six days per week.

Ninth. That the following conclusions of law are not supported by any findings of fact:

(a) That Nephi Giles was killed by an accident arising out of or in the course of his employment.

(b) That Alice Giles was a dependent of the decedent at the time of his death, wholly dependent upon decedent for her maintenance and support.

(c) That Alice Giles is afflicted with paralysis in her lower limbs and is physically disabled and under a doctor's care.

Tenth. That the following conclusions of law are contrary to law:

(a) That Nephi Giles was killed by an accident arising out of or in the course of his employment.

(b) That Alice Giles was a dependent of the decedent at the time of his death, wholly dependent upon decedent for her maintenance and support.

(c) That Alice Giles is afflicted with paralysis in her lower limbs and is physically disabled and under a doctor's care.

Eleventh. That the amount of the award is not based upon any competent evidence.

Twelfth. That the amount of the award is contrary to law.

Thirteenth. That the findings of fact are insufficient to support and justify the decision and award made therein.

Fourteenth. That there is no competent evidence in that case to support the decision and award therein.

Wherefore, your petitioner prays that this court may issue a writ of certiorari or review directed to the Industrial Commission of the State of Utah, defendant herein, directing the said Commission to certify its record, [fol. 6] including all the proceedings had and taken in said case to this court, at such time within thirty days after the issuance of said writ as may please this court to the end that the same may be reviewed by this court; that upon the hearing of said writ said decision, findings of fact, conclusions of law, and decree and award of said Commission be annulled and held for naught.

Richard F. Bond.

Subscribed and sworn to before me this 5th day of February, 1926. B. A. Bjorklund, Notary Public, residing at Salt Lake City, Utah. (Seal.)

[File endorsement omitted.]

[fol. 7] IN SUPREME COURT OF UTAH

[Title omitted]

WRIT OF REVIEW—Filed February 6, 1926

The State of Utah to the Industrial Commission of Utah:

Whereas, it has been made to appear to us by affidavit of Richard F. Bond, filed for and on behalf of the plaintiffs, the Bountiful Brick Company and the United States Fidelity and Guaranty Company, that the said Richard F. Bond is the manager of the plaintiff, the United States Fidelity and Guaranty Company, for the State of Utah; and

Whereas, it has been made to appear by said affidavit that recently before you such proceedings were had that you irregularly and without authority or jurisdiction in the premises, in the proceedings wherein Elizabeth W. Giles, widow of Nephi Giles, deceased, for herself and Alice and Mabel Giles, daughters of decedent, was applicant, and the Bountiful Brick Company and the United States Fidelity and Guaranty Company were defendants, which said proceedings were numbered 1463, rendered your decision, findings of fact, conclusions of law and decree awarding compensation to the applicant therein to be paid by the Bountiful Brick Company or the United States Fidelity and Guaranty Company, plaintiffs herein, for losses sustained and injuries received arising out of the death of the said Nephi Giles, deceased, which said death was caused by an accident arising out of and in the course of his employment by the said Bountiful Brick Company for whom [fol. 8] the United States Fidelity and Guaranty Company was the insurer, said compensation to be paid on the basis of $8.65 per week beginning on the 20th day of June, 1925, for a period of not to exceed 312 weeks, and awarding the further sum of $150.00 to partially defray the expenses of the funeral of the deceased; and,

Whereas, it is alleged by said affidavit that your proceedings therein were irregular, without authority, contrary to law, and in violaion of the provisions of Title 49, Compiled Laws of Utah 1917, as amended by the Laws of Utah 1919, Chapter 63, as further amended by the laws of Utah 1921,

Chapter 67, and as further amended by the Laws of Utah 1925, Chapters 73 and 80, and in contravention of Section 7, Article 1 of the Constitution of the State of Utah and Section 1, Article XIV of the Constitution of the United States, in the following particulars, to-wit:

First. That your decision and award therein are contrary to law;

Second. That the applicant, prior to the award of the Commission, failed to assign her cause of action against the Bamberger Electric Company, or any cause of action arising out of the death of the said Nephi Giles, deceased, to the plaintiffs herein, or either of them;

Third. That the accident which caused the death of the said Nephi Giles did not arise out of or in the course of his employment with the Bountiful Brick Company, one of the plaintiffs herein;

Fourth. That under the facts as shown by the evidence adduced at the hearing on this cause the injury which caused the death of the said Nephi Giles, deceased, is not compensable under the Workmen's Compensation Act of this State;

Fifth. That at the time of the said injury resulting in the death of the said Nephi Giles, deceased, the relationship of employer and employee did not exist between the said Nephi Giles and the plaintiff herein Bountiful Brick Company;

Sixth. That Section 3113 of the Compiled Laws of Utah [fol. 9] 1917, as amended by Laws of Utah 1919, Chapter 63, as interpreted and applied by the defendant, The Industrial Commission of the State of Utah, in making its said decision and award therein, contravenes Section 7, Article 1 of the Constitution of the State of Utah and Section 1, Article XIV of the Constitution of the United States;

Seventh. That in arriving at its decision and award the said Industrial Commission of the State of Utah, the defendant herein, acted upon its own information, to-wit, information obtained from a view of the premises of the defendant Bountiful Brick Company;

Eighth. That there is no competent evidence to support those portions of paragraph one of the findings of fact of the Industrial Commission of the State of Utah, the defendant herein, which read as follows:

(a) That this brick plant is located in an isolated spot in the center of what was originally a large tract of land, probably one-half mile square;

(b) That on the east, west, north and part of the south sides of this section of land, individual farms are established and fenced;

(c) That since the establishment of this brick plant on the interior of this tract the Bamberger Electric Railroad Company has acquired a right of way running north and south through the middle of said tract of land;

(d) That the decedent in order to reach the premises of his employer walked along the public highway to the tract of land within which the brick company was located;

(e) That he would use, as far as practical, the open highways;

(f) The wire fence of the Bamberger Electric Railroad Company right of way had openings on the east side;

(g) And after crossing the tracks entered an improvised gate or small opening on the employer's side of the right of way which — the customary entrance to the premises of the employer;

(h) In selecting this way of approach to and entrance to the employer's premises, the decedent used the most practical and reasonable way of reaching his destination;

(i) And could not otherwise have entered his employer's premises without crossing the Bamberger Electric Railroad tracks on the Burns road and proceeding along the railroad tracks a distance of approximately 800 feet to the hole in the fence;

(j) Or walking an unreasonable distance of perhaps one-half or three-fourths of a mile around the south side of the section in the center of which the brick plant was located and enter at about midway on the west side;

(k) So that the eastern entrance which the decedent always used was the only one that did not involve wading through deep weeds and willows and more or less water during certain seasons of the year;

(l) There are two dry elevated passage ways running from the plant to the Bamberger Electric tracks;

(m) And the other a path leading to the hole in the fence referred to;

(n) But the so-called gate to which Giles was making his way was always opened;

(o) He was using this way of entrance at the time of the accident;

[fol. 10] (p) The decedent used the natural, reasonable and customary route to work;

(q) That what the decedent did was the most natural, reasonable and practical thing he could have done in taking the shorter route and passing through the openings of the fence and entering the premises where a hole was provided or maintained or permitted to be maintained for that purpose;

(r) That the decedent was working six days a week.

Ninth. That the following conclusions of law are not supported by any findings of fact:

(a) That Nephi Giles was killed by an accident arising out of or in the course of his employment;

(b) That Alice Giles was a dependent of the decedent at the time of his death, wholly dependent upon decedent for her maintenance and support;

(c) That Alice Giles is afflicted with paralysis in her lower limbs and is physically disabled and under a doctor's care.

Tenth. That the following conclusions of law are contrary to law:

(a) That Nephi Giles was killed by an accident arising out of or in the course of his employment;

(b) That Alice Giles was a dependent of the deceased at the time of his death, wholly dependent upon decedent for her maintenance and support;

(c) That Alice Giles is afflicted with paralysis in her lower limbs and is physically disabled and under a doctor's care.

Eleventh. That the amount of the award is not based upon any competent evidence.

Twelfth. That the amount of the award is contrary to law.

Thirteenth. That the findings of fact are insufficient to support and justify the decision and award made therein.

Fourteenth. That there is no evidence in that case to support the decision and award therein.

And Whereas, it further appears that on the 13th day of January, 1926, you denied a petition for rehearing filed with you by the said Bountiful Brick Company and the United States Fidelity and Guaranty Company, plaintiffs herein.

We being willing that your said proceedings in the premises and appertaining thereto should be certified and returned by you to the Supreme Court of the State of Utah do hereby command that you certify and return unto the Supreme Court of the State of Utah at a session of said court to be held at the court rooms thereof in Salt Lake [fol. 11] City, Utah, at 10 o'clock A. M. on the 25th day of February, 1926, a transcript of the record and proceedings in said action wherein said Elizabeth W. Giles, widow of Nephi Giles, deceased, for herself and Alice and Mabel Giles, daughters of said decedent, was applicant, and the Bountiful Brick Company and the United States Fidelity and Guaranty Company were defendants, which said application bears claim No. 1463, so that our court may review the same and further act thereon as of right and according to law, and have you then and there this writ, and in the meantime you will further desist from proceeding in the matter to be reviewed, and we do hereby further command that Elizabeth W. Giles, widow of Nephi Giles, deceased

for herself and Alice and Mabel Giles, daughters of decedent, appear and show cause before our Supreme Court at the time and place why the said award and decision of the said Industrial Commission should not be set aside and reversed in accordance with the prayer of said petition of the said United States Fidelity and Guaranty Company and the Bountiful Brick Company, so that our court may review the same and further act thereon as of right and according to law, and have you then and there this writ, and in the meantime you will desist further in the matter to be reviewed.

Witness The Justices of our Supreme Court at Salt Lake City, Utah, this 5th day of February, 1926.

By the Court:

H. W. Griffith, Clerk. (Seal.)

Service acknowledged, 2/6/26.
Industrial Commission of Utah, by Carolyn I. Smith, Secretary.

[File endorsement omitted.]

[fol. 12] Certificate and return of service of writ omitted in printing.

[fols. 13-20] Secretary's certificate to transcript omitted in printing.

[fol. 21] BEFORE THE INDUSTRIAL COMMISSION OF UTAH

Claim No. 1463

ELIZABETH W. GILES, Widow of Nephi Giles, Deceased, for Herself and Alice and Mabel Giles, Daughters of Decedent, Applicant,

vs.

BOUNTIFUL BRICK COMPANY, U. S. FIDELITY & GUARANTY Co., Defendants

DECISION

On August 4, 1925, Elizabeth W. Giles of Bountiful, Utah, made application to the Commission for compensation for the death of her husband, Nephi Giles, alleging in part as follows: That on the seventeenth day of June, 1925, her husband was killed by reason of an accident arising out of or in the course of his employment, while regularly employed by John Leddingham, proprietor and manager of the Bountiful Brick Company. It is further alleged that the decedent at the time of his death was seventy-four years of age; that he was employed by Mr. Leddingham at the Bountiful Brick Company and that while within about thirty feet of the brick yard, on his way to work, he was struck by a Bamberger Electric Railroad Company train on the Bamberger tracks and instantly killed; that the employer was notified immediately after the fatality; that the applicant alleges that she is the lawful wife of the decedent and was living with him at the time of his death; that Alice Giles and Mabel Giles 18 and 15 years of age, respectively, are both daughters of the decedent and were living with him at the time of his death and wholly dependent upon him for their maintenance and support.

Pursuant to notice and order of the Industrial Commission of Utah, this cause came on regularly to be heard on the thirteenth day of October, 1925, at the State Capitol, Salt Lake City, Utah.

Findings

According to the stipulations entered into and the evidence submitted, the Commission finds the following to be the facts:

I

That Nephi Giles on the seventeenth day of June, 1925, was fatally injured by an accident at or near the plant of the Bountiful Brick Company, by whom he was employed, which plant is located on the West side of the Bamberger Electric Railroad Company's tracks, Bountiful, Utah; that the decedent lived a mile and a half or more southeast of said plant; that this brick plant is located in an isolated spot in the center of what was originally a large tract of land, probably one-half mile square; that on the east, west and north and part of the south sides of this section of land, individual farms are established and fenced; that since the establishment of this brick plant on the interior of this tract, the Bamberger Electric Railroad Company has acquired a right-of-way running north and south thru the middle of said tract of land and has maintained fences on both sides of the right-of-way; that the decedent in order to reach the premises of his employer walked along the public highway to the tract of land within which the brick company was located; that he would use, as far as was practical, the open highways but because of the inaccessibility of the company's premises on the south side, which was fenced, and along which ran a deep and impassable ditch which was filled with willows and trees and thru which a mill stream ran, he could not enter the premises on that side; that he, like other employes on their way to work coming from their homes which were located to the east of the plant, would follow these open highways or lands, and was in the practice of walking up the Bamberger track or, on other occasions, would walk thru small trails crossing the private farms in order to gain entrance to the employer's premises and then crossing said tracks to enter [fol. 22] the brick plant. There were several such ways which were used by the employes and to all of these approaches to the premises, it was inevitable that the Bamberger tracks be crossed in order to enter the plant. The

wire fence of the Bamberger Electric Railroad Company right-of-way had openings on the east side thru which these employes, including the decedent, passed and after crossing the tracks entered an improvised gate or small opening in the employer's side of the right-of-way which was the customary entrance to the premises of the employer. In selecting this way of approach to the entrance to the employer's premises the decedent used the most practical and reasonable way of reaching his destination and could not otherwise have entered his employer's premises without crossing the Bamberger Electric Railroad tracks on the Burns road and proceeding along the railroad tracks a distance of approximately 800 feet to the hole in the fence, or walking an unreasonable distance of perhaps one-half or three-fourths of a mile around the south side of the section in the center of which the brick plant was located and enter at about mid-way on the west side. The brick plant proper, including the several kilns now in use is almost entirely surrounded by deep hollows created by the removal of the clay used in the manufacture of bricks. These hollows, during the Spring and early Summer months are more or less filled with water and are overgrown with deep grass and weeds. The impassable ditch which crosses the premises on the South has no bridge or crossing of any sort, so that the eastern entrance which the decedent always used was the only one that did not involve wading thru deep weeds and willows and more or less water during certain seasons of the year. There are two elevated dry passage ways running from the plant to the Bamberger Electric tracks—one a spur of the railway and the other a path leading to the hole in the fence referred to, the railroad spur has a wire gate enclosure which may be opened but the so-called gate to which Giles was making his way way always opened. He was using this way of entrance at the time of the accident and owing to the peculiar location of the plant and its surroundings, the decedent used the natural, reasonable and customary route to work. The Industrial Commission visited the premises and is of the opinion that what the decedent did was the most natural, reasonable and practical thing he could have done in taking the shorter route and passing thru the openings of the fences and entering the premises where a hole was provided

or maintained or permitted to be maintained for that purpose.

II

That the decedent met his death at the hands of a third party, and, in compliance with the provisions of the Industrial Act, the claimants have agreed to execute in proper form, an assignment of all their right and claims for accident against said third party, namely the Bamberger Electric Railroad Company to the Bountiful Brick Company or the United States Fidelity & Guaranty Company, the insurance carrier for defendant employer, and that a certified copy of said assignment will be filed with the Industrial Commission; that the decedent was paid wages at the rate of $2.50 per day working six days per week.

Conclusions

In view of the foregoing findings the Commission concludes that Nephi Giles on the seventeenth day of June, 1925 was killed by an accident arising out of or in the course of his employment at a point near to the plant and adjacent to the customary entrance of said plant of the Bountiful Brick Company by being struck by the Bamberger Electric Railroad train at that point; that the Bountiful Brick Company is an employer subject to the provisions of the workmen's compensation act; that Elizabeth Giles was the lawful wife and Alice and Mabel Giles were the lawful children of the decedent and all were living with him at the time of his death and were wholly dependent upon him for their maintenance and support; that Alice Giles is afflicted with paralysis in her lower limbs and is physically disabled and under a doctor's care.

Wherefore it is ordered that compensation be and the same is hereby awarded to be paid to the above claimants [fol. 23] in the sum of $8.65 per week same payable every two weeks by the Bountiful Brick Company or John Leddingham, proprietor, or the United States Fidelity & Guaranty Company, same to be paid for a period of not to exceed 312 weeks beginning with the twentieth day of June, 1925; that the said defendants are hereby ordered and directed to make payments in conformity with this decision and in

addition thereto they are to pay $150.00 to partially defray the expense of the funeral of the deceased.

It is further ordered that in case any party hereto is dissatisfied with the decision herein rendered and desires to appeal from the same, application for rehearing must be filed with the Commission within twenty days from the date hereof.

The Industrial Commission of Utah. —— ——,
Commissioners.

[fol. 24] Before the Industrial Commission of Utah

Claim No. 1463

[Title omitted]

Dissenting Opinion

In dissenting from the opinion of my colleagues in this case, I do so for the following reasons:

The first finding that the applicant was killed "at or near the plant of the Bountiful Brick Company" is misleading. The record is clear that he was not killed and could not have been killed at the plant on the main line of the Banberger Electric Railroad by a south bound train. Why this simple fact is found in the alternative is not apparent. The remaining facts as set out in this opinion are lost in a cloud of reasons and arguments in their support. In arriving at the conclusion that this case is compensable, Cudahy Packing Company versus the Industrial Commission, 207 Pacific, Page 1148 seems to have been relied upon.

In the Paramore case the Commission stretched the bounds of liberality to a point hitherto unrecognized in a compensation case. If the instant case is not distinguishable from the Paramore case, then the applicant is entitled to compensation. If it can be distinguished from the Paramore case and it is found necessary to stretch the bounds of liberality in awarding compensation beyond the point set in that case, then in my opinion compensation to the applicant should be denied. It seems that the cases can be distinguished in the following particulars:

1. Paramore was killed in the act of making a direct crossing where he had a right to cross and was expected to cross in going to and coming from his work; at a point where the engineer in charge of the engine is charged regularly with exercising the greatest precaution in order to avoid a collision with objects on the crossing; on the other hand, Giles was killed one-fourth of a mile from the nearest point where he had a legal right to cross and where the motorman is not charged with the same degree of care as is the case at the crossing.

2. Paramore had a right to be where he was killed; Giles did not.

3. Paramore was in the act of making a direct crossing and proceeding directly to his work; Giles was walking upon the track (not crossing it) and away from his work at the Bountiful Brick plant.

4. Paramore was committing no trespass; Giles was.

In view of the foregoing it is plain that Giles assumed on his own responsibility a hazard in addition to the one peculiar to his employment and that compensation should therefore be denied the applicant.

—— ——, Commissioner.

{fol. 25} Before Industrial Commission of Utah

Motion Denying Petition for Rehearing—January 13, 1926

Roll Call

Voting	Aye	Nay
Mr. Knerr	1	
Mr. Morris	1	
Mr. Chairman		1
Result	2	1

I move that Defendants' Petition for re-hearing in above named case be denied and interested parties so notified.

W. M. Knerr, Commissioner.

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, January 13, 1926.

O. F. McShane, Chairman. Carolyn L. Smith, Secretary.

[fols. 26–29] Petition for rehearing, covering three pages, omitted from this print. It was denied and nothing more by order January 13, 1926.

[fol. 30] Before the Industrial Commission of Utah

Claim No. 1463

[Title omitted]

Statement of Evidence

Report of Hearing

Pursuant to notice and order of The Industrial Commission of Utah, this cause came on regularly to be heard this thirteenth day of October, 1925, before Hon. Wm. M. Knerr, Commissioner, at 10:40 o'clock a. m. in Room 416 State Capitol, Salt Lake City, Utah.

The applicant was present in person; the Bountiful Brick Company was represented by Mr. John Leddingham, its manager; the U. S. Fidelity & Guaranty Company was represented by Mr. H. F. Benson, Claims Adjuster.

B. P. Spry, Reporter.

[fol. 31] Statement of Case

Mr. Knerr: On August 4, 1925, Mrs. Elizabeth W. Giles, of Bountiful, Utah, filed with the Industrial Commission of Utah written application for adjustment of her claim for compensation, alleging in part as follows: That on the seventeenth day of June, 1925, Nephi Giles was killed by reason of an accident arising out of or in the course of his employment while regularly employed by John Ledding-

ham an employer subject to the State Industrial Act; that the petitioner is the wife of the deceased. It is further alleged that the decedent was 74 years of age, that he was employed by Mr. Leddingham at the Bountiful Brick Company, and that while within thirty feet of the brickyard going to work he was struck by a Bamberger Railroad Company train on the Bamberger tracks, being killed instantly. In answer to the question of wages of employe at time of accident the answer is given: "When firing kiln as deceased did the day before and was about to do when killed he had been paid at the rate of $3.75 per day of 12 hours, being paid twice each month, 7 days per week." It is also alleged the employer was notified immediately after the deceased was killed. The names of the dependents of deceased are given as: Mrs. Elizabeth W. Giles, widow, Alice Giles, 18 years of age in January 1925, and Mabel Giles, 15 years of age in June 1925, daughter, of the decedent, all residing at Bountiful, Utah.

Mr. Knerr: The name of the firm is the Bountiful Brick Company, Mr. Leddingham?

Mr. Leddingham: Yes.

Mr. Knerr: Are you the manager?

Mr. Leddingham: Yes.

COLLOQUY BETWEEN COUNSEL.

Mr. Knerr: May it be stipulated that a statement of the employer showing the wages paid the decedent for six months prior to his death may be submitted to the Commission and may be considered as evidence?

Mr. Benson: Yes.

[fol. 32] Mr. Knerr: Now Mrs. Giles, The State Industrial Act, Section 3133, provides as follows:

"Election as to Remedy—Assignment of Cause.—If an employe under this act be injured or killed while in the course of his employment by another not in the same employment, he or his dependent, in case of death, shall be entitled to compensation and to no other remedy unless the employer be subject to the provisions of sections 3129 and 3130. * * *."

That's where they haven't provided compensation insurance, but in this case they have provided insurance.

"* * *. No employe or the dependents in case of death shall be granted compensation in such case unless such employe or his dependents, as the case may be, shall assign any cause of action existing against the person responsible for or causing the injury or death to the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation. And such cause of action is by this section made assignable, whether it be for injury or death, and the dependents or the personal representative and not the heirs in such case shall have the right and power to make a full and exclusive assignment notwithstanding sections 6504 and 6505, Compiled Laws of Utah, 1917."

Now I take it that the insurance company will present to you a legal form that they will ask you to sign. Is that right?

Mr. Benson: Yes.

Mr. Knerr: And before we proceed with this case we want to ask you now whether you are willing to assign any rights you may have if any against the Bamberger Electric Railroad Company to the insurance carrier. It is our understanding that you may join the insurance company of the employer in suing the Bamberger Electric Railroad Company or making a settlement. If settlement is made for more than you would get under the compensation Act it is our understanding then that the excess of the amount provided for by the State Industrial Act is to be paid to you after the insurance company or employer [fol. 33] deduct the expense of litigation. But understand that this section has never been before our Supreme Court here, but other courts, and particularly the Federal court here has held, particularly Judge Johnson in the Parramore case, has held that the dependents can sue for more than the compensation Act provides.

Now are you willing to agree here that when the insurance company presents to you a legal form for you to sign assigning your rights to them against a third party, you will sign it?

Mr. Giles: Yes sir.

Mr. Knerr: Now in case the commission awards, if that assignment is not before the commission we cannot make an award and will not. Is that satisfactory to you Mr. Benson?

Mr. Benson: Yes.

Mr. Knerr: Are you ready to proceed with the hearing?

Mr. Benson: Yes.

Admissions

Mr. Knerr: Are you willing to admit that on June 17, 1925, and for some time prior thereto, Nephi Giles was employed by the Bountiful Brick Company at Bountiful, Utah?

Mr. Benson: Yes, we will admit that.

Mr. Knerr: And that on said date the Bountiful Brick Company was an employer subject to the State Industrial Act and had procured workmen's compensation insurance with the United States Fidelity & Guaranty Company?

Mr. Benson: Yes.

Mr. Knerr: It was heretofore stipulated that the employer may submit to the Commission a statement covering the earnings of the deceased for six months prior to the injury so we will not go into that now. Did you pay for the burial of the deceased?

Mr. Benson: No.

Mr. Knerr: In view of the admissions made before the Commission the question to be determined is, as we understand it, whether or not Nephi Giles on the 17th day of June, 1925, was killed by reason of an accident arising out of or in the course of his employment while regularly em- [fol. 34] ployed by the Bountiful Brick Company. It is our understanding that he was killed by a third party, namely, the Bamberger Electric Railroad Company. And also the question as to the wage decedent was paid at the time of the injury, it being agreed that the information regarding the wages paid the deceased for six months prior to the date of the injury may be submitted by the employer and may be admitted in the record and considered as evidence.

Mr. Benson: In that connection may I ask what the custom of the Commission is regarding overtime? Apparently this man was paid $2.50 a day working six days a week normally but it seems at this time he was working twelve hours and was paid for overtime.

Mr. Knerr: It depends on how regular that overtime was.

Mr. Benson: Then I would think it was wise for Mr. Leddingham to show on that statement the amount of wages he received by days and the amount of overtime he worked and the days.

Mr. Knerr: Will you do that Mr. Leddingham?

Mr. Leddingham: Yes.

Mr. Knerr: And also the question of whether or not Elizabeth W. Giles was the widow of the deceased and was living with him and was wholly dependent upon him on the date of the injury for her maintenance and support; and also whether or not Alice Giles, 18 years of age last January, was either physically or mentally incapacitated from earning on the date of the death of her father, and also the question of whether or not Mabel Giles was living with her father on the date of his death and was wholly or partially dependent upon him for her support.

Have you paid for the funeral?

Mrs. Giles: No.

Mrs. Elizabeth Waterfall Giles was called to the stand and duly sworn.

Examination by Mr. Knerr:

Q. You may state your name.

A. Elizabeth Waterfall Giles.

[fol. 35] Q. Are you the party who made application to the Commission for compensation?

A. Yes.

Q. And have you heretofore agreed you will assign any rights you may have against the Bamberger Electric Railroad Company to the employer or insurance carrier?

A. Yes.

Q. Have you your marriage certificate with you?

A. I didn't think of it or I could have brought it.

Q. When were you married?

A. 28th of March, 1885.

Q. And where?

A. I was married by Judge Pyper right in Salt Lake.

Q. And you have your marriage certificate at home?

A. Yes.

Q. Now you stated to me informally before the hearing today that Alice Giles, who was over eighteen years of age when your husband was killed, was an invalid. Is that right?

A. Not able to work. I had to bring her here to a specialist on Third South, in the Judge Building.

Q. She has been under medical treatment has she?

A. Yes sir, to a specialist in the Judge building.

Q. What was her ailment?

A. She has no use of her lower limbs.

Q. Paralysis?

A. Yes.

Q. Is she paralyzed now?

A. She is feeling better now. It is in her bowels too.

Q. Is she under medical care now?

A. She should be but I haven't been able to pay him so she isn't.

Q. You don't know who the man is?

A. No, I couldn't tell you.

Q. Was it Dr. Behle?

A. No.

[fol. 36] Q. Dr. Galligan?

A. No. If you wanted to call Mrs. Beck on Ninth South she could tell you his name.

Q. Now on June 17, 1925, were you and your children named in this application living with your husband?

A. Yes sir.

Q. And he provided for you?

A. Yes sir.

Q. Now do you know where he was employed on that date?

A. At Mr. Leddingham's brick yard.

Q. You state in your application that he was struck by the Bamberger Electric Railroad Company's train while he was going to work. Now hos did he go to work?

A. He walked down there.

Q. What route would he take to get down there? First state where you live?

A. We live right on the street car line, quite a bit south of Val Verda, right on the street car track.

Q. What street car track would it be?

A. The Utah Light and Traction.

Q. Now how would your husband go to work?

A. He went down that lane that morning because he was carrying eggs to one of the neighbors so I know he didn't cut across the field that morning.

Q. Did he always go across the field?

A. Sometimes.

Q. Was there a path through the field?

A. That was to get to the main road.

Q. After he got to the main road then how would he proceed to the brick yard?

A. I don't know.

At this point Mr. Sam D. Thurman and Mr. H. I. Price representing the Bamberger Electric Railroad Co. made their appearance.

Mr. Knerr: So you don't know what his usual custom was and the route he followed going to work?

A. I understood he took that travel.

Q. But you are not sure?

A. No, I never went with him.

Q. And you know nothing about it personally?

A. No.

Q. Did he ever tell you?

A. Mr. Windward said he always took that path. He lives on the corner on the regular road.

[fol. 37] Q. Was there a regular path?

A. Yes sir.

Q. Going through the field?

A. Yes.

Q. Would this path cross the Bamberger tracks?

A. Yes sir.

Q. Did you ever see him use this path?

A. No, I never went along with him at all.

Q. Now, when your husband was killed who was the undertaker?

A. You see they took him to Taylor's.

Q. Was it the Union Furniture Company?

A. Yes, they took care of him because Mr. Smedley is a friend of mine.

Q. Did they present a bill to you?

A. Yes.

Q. Is this it?

A. Yes.

Mr. Knerr: Applicant presents a bill of the Union Furniture Company, Bountiful, Utah, dated June 20, 1925, as follows:

Casket	$165 00
Clothes	25 65
Hearse and Services	25 00
Making a total of	$215 65

Was that paid by you?

A. It hasn't been paid.

Q. Was that the only funeral expense incurred?

A. Yes. Well, you see, they took him there and they charged $35.00. From Bamberger's they took him to Taylor's.

Q. Was there $35.00 additional?

A. No. I understood Bamberger paid that $35.00.

Q. There has been no bill presented to you for that $35.00?

A. No.

Q. How long had your husband been employed by the Bountiful Brick Company if you know?

A. Thirty-five years ago he was in their employ.

Q. Was he working for them then?

A. They called it the Improved Brick Yard then.

Q. So he has been working there 35 years?

A. Yes off and on.

Q. Say the last five years was he employed steady at that brick yard?

A. Yes, every season.

Q. Now will you get the name of the doctor that is attending your daughter who is eighteen years of age, Alice Giles, so we may know who he is?

A. Yes.

Q. After we have a recess?

A. Yes sir.

[fol. 38] Q. And will you mail to the Commission your marriage certificate?

A. Yes.

NOTE.—On August 14, 1925, the following certificate was received by the Commission from Mrs. Giles:

"Certificate of Marriage

"TERRITORY OF UTAH,
"County of Salt Lake:

"Know all Men by These Presents:

"That the undersigned, a Justice of the Peace within and for Salt Lake City and County and Territory aforesaid, did, on the 28th day of March in the year One Thousand, Eight Hundred and Eighty Five, Join in Lawful Wedlock Nephi Giles and Elizabeth Waterfall, with their mutual consent.

(Signed) Geo. D. Pyper, Justice of the Peace.

"In the presence of Jane E. Harris, Witness."

The above certificate was returned to Mrs. Giles.

Cross-examination by Mr. Benson:

Q. Mrs. Giles, your daughter who is taking treatment from this doctor,—has the doctor ever made any statement to you as to whether or not the nature of her illness was such that she would be a permanent invalid?

A. Oh, no. She is getting fine now.

Q. Then it is just a temporary condition?

A. Yes.

Q. And prior to the coming on of that condition was she in good health?

A. Yes.

Q. And you anticipate she will be in good health after?

A. Yes.

Q. Able to work?

A. Yes, sir, I think so.

Q. Normal in every way?

A. Yes, sir, I think so.

Mr. Benson: In this connection, Mr. Knerr, we would like to reserve the right to introduce additional medical testimony in connection with the condition of this young lady if it appears to be necessary later on.

Mr. Knerr: If it is a fact, Mrs. Giles, your daughter is not permanently mentally or physically disabled she would not have a claim under the State Industrial Act. I think we better consult the physician about that.

Mr. Benson: Now with regard to the route Mr. Giles followed in going to his work, I believe if I understand you correctly he always followed this particular route?

A. Yes.

[fol. 39] Q. And crossed the Bamberger Electric tracks?

A. Yes. There was no other way of going to work except across the tracks.

Q. Was there any good reason why he couldn't have followed the right of way, thoroughfare, instead of cutting across?

A. There is no other way to get there except across the track.

Q. But he could have taken the regular thoroughfare. Do you know or don't you?

A. I say he might have gone on that street but at the same time he would have to cross the tracks.

Q. I understand that but what I mean is there any reason why he couldn't have crossed the tracks at the regular crossing?

A. He could have I guess.

Q. But he could have gone the regular thoroughfare or regular crossing?

A. Yes but he would have had to walk down the tracks then.

Q. What I mean is he could have gone over the tracks at the regular crossing where automobiles and things cross and could have got over that way?

A. I don't think so. I have taken his dinner down and that's the way I had to go.

Q. Do you mean it was absolutely necessary for him to trespass on the railroad tracks to get to his work?

A. Yes he would have to cross them.

Q. But I mean couldn't he have crossed at the regular crossing?

A. I couldn't say about that.

Q. All right, we will pass that. Now as to the employment; you say he had worked for thirty-five years off and on for the Bountiful Brick Company?

A. Yes.

Q. What did you mean "off and on"?

A. Well, you see, in the winter time they don't work.

Q. How long had he worked?

A. Well, for thirty-five years.

Q. You don't mean every season?

A. Well, there was one time he worked in Ogden.

Q. How long did he work in Ogden?

A. I would say four or five years ago.

Q. Two seasons he worked in Ogden?

A. Not two seasons. It was five years ago, because I went to California that season.

[fol. 40] Q. He worked in Ogden one season?

A. Yes, five years ago.

Q. And to the best of your knowledge outside of that one season he has worked continuously for the Bountiful Brick Company?

A. Yes.

Q. For the last 35 years?

A. Yes.

Mr. Knerr: That's all.

Mr. Benson: That's all.

Mr. Knerr: Mr. Thurman, I take it you are merely an observer. Of course we can't go into the question of negligence here.

Mr. Thurman: That's all.

Mr. Knerr: However, if you have any other questions besides negligence we would be very glad to have you ask them.

Mr. Thurman: No.

Mr. Jay Harris was called to the stand and duly sworn.

Examination by Mr. Knerr:

Q. You may state your name?

A. Jay Harris.

Q. How old are you?

A. I am sixteen.

Q. Are you familiar with the Bountiful Brick Company's property, where it is located?

A. Yes, sir. I live just a little ways from it, east of it.

Q. Are you working at the brick yard?

A. I was when he got hit.

Q. You were working there then on June 17, 1925?

A. Yes, sir.

Q. That is the day Mr. Giles got hurt?

A. Yes, sir.

Q. Did you see Mr. Giles come to work that morning?

A. Yes, sir.

Q. Now state to the Commission just how he came to work, if you know.

A. Well from the main road he came down by our place and down through the field, down through our pasture.

Q. From the main highway he went down through your pasture?

A. Yes, down to the gate where there is a path going across the tracks.

Q. Is there a gate there?

A. Well, kind of a gate.

Q. Describe it.

A. Well it has got wire down where you can step over it, and I believe there is a wire above it, where they would go between it.

Q. They would go between it?

A. No, they would have to crawl through the fence and then across the tracks and go through the gate.

Q. What gate?

A. At the Bountiful Brick Company.

Q. Has it got hinges?

A. No. It is open. It has some wires above it and some [fol. 41] wires below it and they crawl between.

Q. Do you know whether the men usually, outside of Mr. Giles, took that route going to work?

A. Well I don't know. He might have gone down through our place.

Q. Were there any other men used this path up through this gate you describe?

A. There was other men that went down that way.

Q. Was there anyone else outside of Mr. Giles who worked for the Bountiful Brick Company who used this path and who would go the same way?

A. Frank Woolslayer and a Salt Lake boy.

Q. A Salt Lake boy would use that?

A. Yes sir there was one from town came through our place.

Q. How would he do, would he come on the Bamberger or Utah Light & Traction?

A. Utah Light.

Q. And get off where?

A. He would get off at the city limits and walk down.

Q. City Limits at Bountiful?

A. Yes.

Q. And would he be near the highway at that time?

A. I don't know. He would come from the street car to our place and down through our place like Mr. Giles.

Q. When he quit at night how did he go?

A. He went up around the other way, up by Burness and up through the fields to the street car tracks.

Q. And would he have to cross the Bamberger tracks when he went that way?

A. Yes.

Q. On the public highway?

A. No he didn't cross the public highway.

Q. Is there a public highway near the brick yard where men and teams could cross the railroad to get to the brick yard?

A. Quite a ways from there.

Q. About how far would you say?

A. I don't know.

Mr. Knerr: I am wondering whether the insurance company or the Bamberger Railroad Company have a drawing of that track and the vicinity.

Mr. Thurman: We have one here Mr. Price made up, just a rough sketch.

Mr. Knerr: Mr. Waterfall, are you a brother of the applicant, Mrs. Giles?

Mr. Waterfall: Yes.

[fol. 42] Mr. Knerr: I wonder if you would look at this rough sketch of the Bamberger Railroad and the place where Mr. Giles was killed and state to the Commission

whether that is a fairly accurate drawing of the railroad tracks, and the place where Mr. Giles was injured.

Mr. Waterfall: (Examines Sketch.) Yes, that is as close as you could get to it. The only thing he hasn't got is where this fence goes across adjoining this property.

Mr. Knerr: You say there is a fence adjoining this farm house?

Mr. Waterfall: Yes, running northwest from this farm house.

Mr. Knerr: Is there any objection to using this, Mr. Benson?

Mr. Benson: That's all right.

Mr. Knerr: Now son, look at this map. This is supposed to be north this is south and this is west?

A. Yes sir.

Q. And this is east. Now there is a place marked here "Burns road."

A. Yes.

Q. Is that the place you refer to where you said at night the boy would go up the Burns road?

A. No.

Q. How would he come at night when he went home?

A. He would come up here and cross here and come through here.

Q. Would he have to crawl through the fence?

A. Yes.

Q. And cross the Bamberger tracks?

A. Yes, and he would come up here and go out on the road.

Q. Come out on the dirt road to Bountiful?

A. Yes.

Q. Now in going home at night was there a regular pathway?

A. Kind of a path.

Q. Did anyone else use it?

A. Leland Birmingham and Hayes;—well Hayes wasn't working at the time Mr. Giles got hit.

Q. But before when he was working would he use that route?

A. Yes.

Q. Now you mentioned something about a gate?

A. That was here.

Q. On the west side of the track going into the Bountiful Brick yard?

A. Yes. It wasn't a gate but just where you could go through. It was an open gate.

Q. And you say you use that path?

A. I always walked down through the field.

[fol. 43] Q. Didn't use the same path Mr. Giles used?

A. I went just about this way and he went just about this way.

Q. Now did the brick company ever tell you not to cross the track and go through the fence there?

A. No, I don't think so.

Q. Well, do you know whether they did or not?

A. No.

Q. Do you know whether or not they had any notices posted that the men were not to cross the track?

A. I didn't see any.

Q. And are you sure the foreman or Mr. Leddingham never told you not to cross the track?

A. No.

Q. Would you say that all men who lived on the west side of the Bountiful Brick yard used one of the paths you said were used by men going to the brick yard?

A. On the west side?

Q. Men living on the east side?

A. Yes there were some went down through, through the same trail.

Q. Was there a public highway going down that way they could have used?

A. The only one was Burns road.

Q. How far was that would you say?

A. I couldn't tell exactly.

Q. Would you say it would be as much as a Salt Lake block?

A. No, not quite that much. You would have to go down the road and come back up, go down this way and come up to the brick yard again, or go through the brush and come through the field.

Q. Do you know whether Mr. Leddingham had any knowledge that the men were crossing through the fields?

A. I don't know. I guess he did.

Q. He never walked across there with you did he?

A. No.

Q. Did you ever see Mr. Leddingham use any of those paths you stated?

A. No.

Q. Where were you the morning Mr. Giles was killed, the moment he was killed?

A. I was just opening the gate going to milk the cow.

Q. Did you see him?

A. I seen him about ten minutes before I milked the cow. He was coming down the road and I went in the house and I didn't see nothing until I went out to milk.

Q. So you were not there at the time he crossed the tracks?

A. No. Well, I had the bucket going out to milk when he crossed the tracks.

Q. About how far was that from the place where he crossed the tracks?

A. I don't know. I guess it would be about 100 yards. Maybe a little more.

[fol. 44] Mr. Knerr: You may take the witness.

Cross-examination by Mr. Benson:

Q. Jay, you said you were sixteen years old?

A. Yes.

Q. How far have you been in school?

A. I am in the ninth grade now.

Q. Did you know Mr. Giles very well?

A. Well, I have known him pretty near ever since I lived in Bountiful.

Q. You knew him to speak to him?

A. Yes, I spoke to him.

Q. You have talked with him a good many times?

A. Yes.

Q. Did he hear well?

A. Well he could hear pretty good but you would have to kind of talk loud, holler a little.

Q. He was rather deaf then?

A. Yes.

Q. Now with regard to this path across the tracks, was it really a path or was it just the usual bare spot along the railroad tracks?

A. Well there wasn't no path there before the men started going across there.

Q. How long do you think men had been going across there?

A. I couldn't tell you.

Mr. Knerr: How long have you been living there son?

A. I think nine years.

Q. And they have been going across there ever since you lived there?

A. No sir.

Mr. Benson: Well the last year have they been going across there?

A. Yes there has been some since the brick yard started up.

Q. Did you know any who went around the road?

A. No sir.

Q. They went across there merely as a matter of convenience because it was a little shorter;—is that it?

A. Yes sir.

Q. You didn't actually see Mr. Giles struck by the train?

A. No sir.

Mr. Benson: I believe that's all.

Questions by Mr. Thurman:

Q. When they crossed the tracks, the men, they wouldn't always go across in the same place [illegible] they?

A. No. Frank Woolslayer went a different place than the rest.

Q. Well, you went across the tracks too?

A. Yes.

[fol. 45] Q. And you would go across one place one time and another place another time?

A. No, I usually took the same one. Not where they went across but about ten yards from there.

Q. You know what a right of way fence is?

A. Yes.

Q. Were there any gates in the right of way fence?

A. No.

Q. There were several wires on the post?

A. Something like that, six or seven.

Q. And you boys would spread the wires to go through?
A. Yes.
Q. And was there any gate on the other side or on either side of there that you know of?
A. There used to be a gate.
Q. A swinging gate?
A. No.

Mr. Knerr: You mean just an opening don't you?
A. Yes.

Mr. Thurman: Between the wires?
A. Well you could take a fence post down, there used to be but it was nailed up.

Mr. Knerr: Was there a fence post down when Mr. Giles was killed?
A. No sir. It was nailed up.

Mr. Thurman: So if Mr. Giles went through he would go through the wires on the fence?
A. On which side? On our side he would, but not on the other side.
Q. On the side east he would have to spread the wires to go through?
A. Yes.
Q. And then on the other side you say the wires were more spread?
A. No sir.
Q. You wouldn't have to spread the wires?
A No sir, there were two posts and some wires at the top and below, and you could step between the two.
Q. There were wires above?
A. I think one.

Mr. Knerr: Do you know whether the company provided a path for the men to walk on on the east side of the track?
A. No sir.
Q. The company didn't provide a road for the use of the men to come home on the east side?
A. No.

Mr. Benson: Do you know any reason why Mr. Giles could not have gone around and crossed on the Burns Road where wagons and other people crossed?

A. It would have been quite a walk.

[fol. 46] Q. How much of a walk,—a quarter of a mile?

A. Something like that.

Q. He could have walked around the road if he had wanted to?

A. Yes, but he saved about a quarter of a mile cutting thru.

Mr. Knerr: Did Mr. Giles live south of the Burns road?

A. Southeast of the Burns road up by the street car tracks.

Mr. Benson: He lives south of the Burns road?

A. No, southeast of the Burns road.

Q. All right. Then when he was going to work was there any good reason why he couldn't have followed the Burns road across the tracks and then come down to the brick yard?

A. I don't know, but you see if he came down this road he would have to go down through here.

Q. Couldn't he have cut through here and come down here?

A. I think so, but he would have to go through a deep ditch and brush.

Q. Then it wasn't much shorter to come through here and out over but it was better walking?

A. Yes.

Mr. Knerr: Now here is a place called "Bountiful Brick Yard"?

A. Yes.

Q. And south of it is designated "Burns Road."

A. Yes.

Q. Now take the Burns road and go directly west on the Bamberger track?

A. Yes.

Q. Then when you go west from the Burns road to the brick company is there a gate to the brick company?

A. Yes.

Q. Did the brick company provide a gate from the Burns road directly across the track up to the brick company?

A. I never seen any.

Q. Do you know whether any of the men entered the brick yard from the Burns road?

A. No sir.

Q. Never saw anyone use that path if there was a path on the west side?

A. No sir.

Mr. Knerr: That's all.

Mr. Benson: You don't know of any reason why the men shouldn't have come down on the west side if they wanted to?

A. No.

Mr. Knerr: You said something about a ditch on the west side of the Bamberger track to the brick yard. What kind of a ditch was it?

A. A mill ditch.

[fol. 47] Q. Did the brick company build a bridge across that ditch to get to the brick yard?

A. I never seen any.

Q. Never seen any teams or men cross there to get to the brick yard on the south side?

A. No sir.

Mr. Benson: If he had come up the Burns road and to the brick yard how long would it have taken him?

A. I couldn't say.

Q. Would you say half a mile?

A. Pretty close to three blocks.

Q. Three blocks out of the way?

A. Two or three blocks.

Q. That is all he would go out of his way?

A. That's all.

Mr. Knerr: I wonder if the Commission could use that sketch for their information?

Mr. Thurman: You can keep it and we can get it if we need it.

Mr. Waterfall: Going off this road isn't it almost impossible to hang on to the road to the brick yard?

A. Yes, ditches and otherwise.

Q. You have spoken to Mr. Giles almost every morning haven't you, quite frequently?

A. Well almost every morning.

Mr. Knerr: Have you any other witness?

Mr. Waterfall: We have this man here who saw him right after he was struck.

Mr. Knerr: I take it you admit Mr. Giles was killed.

Mr. Benson: No argument on that.

Mr. Knerr: Now Mr. Thurman before you entered the room I read Section 3133 of the State Industrial Act to the applicant and told her before the Commission could proceed and award she would have to assign her rights to the insurance company against the Bamberger Electric Railroad Company.

Mr. Knerr: Any further evidence?

Mr. Waterfall: Well that's all. Mr. Schultz here saw the body right after he was killed.

Mr. Knerr: There is no question about that.

Mr. Benson: No.

[fol. 48] Mr. JOHN S. LEDDINGHAM was called to the stand and duly sworn:

Examination by Mr. Knerr:

Do you want the Commission to examine this witness?

Mr. Benson: Yes, you may.

Mr. Knerr: State your name?

A. John S. Leddingham.

Q. What is your business?

A. Brick making.

Q. Where?

A. Bountiful, Utah.

Q. You are the manager of the Bountiful Brick Company?

A. Yes.

Q. Were you its manager on June 17, 1925?

A. Yes sir.

Q. And how long have you been its manager?

A. Well, I started the business two years ago. I own it. I have been manager of the Improved for a good many years but took it over about two years ago.

Q. So you were manager of this particular yard for a good many years?

A. Yes.

Q. How long has he been working for that brick yard?

A. Twenty-five or thirty years.

Q. Do you know where Mr. Giles lived?

A. Yes.

Q. Taking this map here that was drawn by a member of the Bamberger Electric Railroad Company, here we find a place designated "Burns Road." Now indicate whether he was south of the road or where?

A. He was south of the road.

Q. Southeast?

A. Yes.

Q. And southeast of the plant?

A. Yes.

Q. Did you ever observe him coming to work and going from work?

A. Yes, I have noticed him a number of times.

Q. How would he usually go to work?

A. Well his route would vary. It wasn't always the same. Sometimes he would go north of the place and through, sometimes through this place described, and sometimes over the Bamberger property.

Q. Had you knowledge he was using the Bamberger property before the time of this injury?

A. I had seen him go through there, not as a regular thing.

Q. Did you at any time give orders to any of the employes not to cross the Bamberger tracks unless they crossed at a public highway?

A. No sir.

[fol. 49] Q. Taking the Burns road south of the brick yard. The boy just previously testified that directly north of the road and between the road and the brick yard there is a ditch called Mill creek?

A. South of the yard.

Q. And north of the Burns road?

A. Yes.

Q. Now did you provide a bridge leading from that road over that ditch?

A. No sir.

Q. Did you provide a road anywhere from the Burns road leading to your plant?

A. No sir.

Q. Do you know whether at the place Mr. Giles was killed there was a regular path used by him and other employes?

A. No, there is no regular path. That is there is no worn trail.

Q. Do the men usually pass through the same place?

A. No. This man Woolsey and Giles would be the only ones who crossed at this point.

Q. And the boy mentioned something about a gate on the west side of the tracks?

A. There is a hole in the fence, it is no gate.

Q. Did you make that?

A. No. The Bamberger; in putting up the fence, there are two poles there about two or three feet apart. That is usually always broken in there. Men walking from the north would go through there and coming from the south they would go through there.

Q. They would walk down the right of way, the track, and they would get to where these two posts are and there was a strand of wire at the bottom and one at the top?

A. Yes.

Q. And you think someone took the middle one out?

A. I suppose.

Q. Did you have knowledge men were coming through there?

A. Yes.

Q. Did you tell them not to?

A. No sir.

Q. Do you know whether or not the Bamberger Railroad Company had signs up there forbidding men to pass through?

A. Not that I knew of.

Mr. Knerr: I think that's all.

Examination by Mr. Benson:

Q. Had you advised Mr. Giles that if you were in his place you would keep off the tracks?

A. I have cautioned him a number of times about being more careful.

Mr. Knerr: About being careful?

A. Yes. In fact they had stopped the train there once [fol. 50] before hitting him and I cautioned him. I said "You are deaf and use your eyes and keep off that track."

Mr. Benson: What did he say?

A. He said they hadn't killed him yet.

Q. How long was this before the accident?

A. Just about a year before.

Q. Had you ever known of Mr. Giles coming down the Burns Road to the electric line and then coming down the right of way and crawling through the fence.

A. Yes I have watched him coming along that way.

Q. And you have also known him to come across the Bamberger on the Burns Road and approach the plant from the south?

A. He would come right along the road on the right of way. When he would take the Burns crossing he would come along the track.

Q. You have known him to use that route?

A. Yes.

Mr. Knerr: You say he would come along the tracks when he came down the Burns crossing?

A. Yes.

Q. Do you mean he would go along the railroad tracks?

A. Yes.

Q. And then come down through that same hole in the fence?

A. He would usually come down a siding then.

Q. Then as I understand it, when he came down the Burns road he would get to the track and would walk along the right of way until he got to the spur track and then into the yard?

A. Yes.

Mr. Benson: Would you say that would be the more customary way?

A. I couldn't say. I would see him coming all ways.

Q. After you had warned him after they stopped the train for him did he use more caution?

A. No, about the same thing.

Q. Rather made a joke of it?

A. He didn't pay much attention to the warning.

Q. The boy mentioned a gate awhile ago. I believe you said there was no gate?

A. No gate.

Q. Just a hole in the fence?

A. That's all.

Q. And there was no reason why any employe of yours couldn't have come down the Burns Road and approached from the west side if they wanted?

A. They should have come that way.

Q. And it wouldn't have taken them much out of their way?

A. No. As the boy said, two or three city blocks.

[fol. 51] Q. That much farther than cutting across lots?

A. Yes.

Q. How far is your plant located from the Burns road north?

A. I should judge about 200 yards north of the road.

Q. Someone testified regarding a ditch between your plant and the Burns road. Was that ditch of such nature as to prove a serious obstruction to foot traffic?

A. Yes, it was almost impossible to come through that.

Q. Full of water?

A. Not full of water, but a deep ditch.

Q. So it was almost necessary for them to come down the Burns road and then up the west side of the plant in?

A. Yes.

Q. And you estimate that would take them about 1,000 feet out of their road?

A. About a thousand feet.

Q. How long had Mr. Giles been working for you steadily the last time?

A. He commenced in April or May, 1924, then was off during the winter.

Q. Prior to April or May, 1924 when he began his last period of employment, how long had it been since he terminated the period of employment the previous time?

A. About four or five years. The plant had been shut down.

Q. Four or five years he hadn't worked for you prior to this?

A. I was running the Improved plant before this and he worked for me at the Improved, then we were fown four or five years and then I took this up about two years ago.

Q. Then as I understand you he had not worked at this plant for four or five years previous to this?

A. Between four and five.

Mr. Benson: That's all.

Mr. Knerr: When he started to work for you in 1924, I think you said April.

A. April or May.

Q. Did he use that route during that time?

A. I couldn't say. I didn't notice until I warned him a month or two after we got started.

Q. How did you warn him?

A. I told him he would have to be more careful. I said "You know you are deaf. Keep off the railroad tracks, but if you must go on the railroad use your wits."

Q. Did you at that time order him to take the Burns public highway to get to his employment?

A. No I did not. He had had some trouble on the street car line had a close call, and that is why I warned him.

[fol. 52] Q. Did you expect him after you warned him to discontinue using the street car tracks?

A. I thought he would use better judgment.

Q. You didn't give him an order to discontinue using this trail?

A. No I didn't give him any order to discontinue the trail.

Q. Did you expect him to abide by your order?

A. I told him to keep off that path.

Q. Did you see him use this path after you cautioned him?

A. No.

Mr. Benson: You didn't assume to exercise any right over the men as to how they should come to work did you?

A. No.

Q. You didn't think that was your right to tell them how they should come to work, what route they should follow?

A. No.

Q. You did that as a friendly act?

A. Yes.

Q. Wasn't trying to exercise a right over him as an employer?

A. No.

Q. Didn't think it was necessary to exercise that right?

A. No.

Q. Or to personally lead your employes to and from work?

A. Why no.

Mr. Knerr: Was it necessary for you to have your brick plant next to the railroad tracks in order to facilitate your business?

A. Yes.

Mr. Waterfall: The brick yard was there before the railroad came there?

A. I don't know.

Mr. Waterfall: Of course to my own knowledge I know it was. And you wouldn't know whether he crossed there before the railroad was there or not. We claim he crossed there before the railroad was put in.

A. I don't think there was a brick yard there before the Bamberger. There was a brick yard farther north.

Mr. Knerr: In other words would you say that this brick yard was put at this particular place in order to facilitate the shipment of brick, close to the railroad?

A. Yes.

Questions by Mr. Thurman:

On the east right of way fence there were no holes in the fence at all?

A. No.

Q. That is the wires were intact?

A. Yes.

Q. You understand there are five wires?

A. Yes.

Q. And all five wires were there?

A. Yes.

Q. Now on the west side, with the exception of the two posts which were close together, the wires were intact?

A. Yes.

[fol. 53] Q. Now between the two posts how many wires were there?

A. A wire at the top and bottom.

Q. Someone had cut the wires?

A. Yes.

Q. At first they were all there?

A. Yes.

Q. Was there a well beaten path across the track anywheres?

A. No sir.

Mr. Thurman: That's all.

Mr. Knerr: That's all. Any further evidence Mr. Benson?

Mr. Benson: No further witnesses.

Mr. Knerr: It is understood Mrs. Giles will present her marriage certificate.

Mr. Benson: Yes and the employer will present a statement of wages showing his wages separately.

Mr. Knerr: Now will you try and find out who that doctor is in the Judge Building who treated your daughter Alice?

Mrs. Giles: Yes.

Mr. Knerr: There is a telephone in the next room.

(Mrs. Giles telephones and reports the doctor's name as Dr. Pace.)

Mr. Knerr: Now you testified that you thought your daughter would recover and that this was just a temporary ailment. Now in order for her to secure compensation she would almost have to establish it was permanent.

Mrs. Giles: Well you do what you think is right. That's all I ask.

Mr. Knerr: The case will be submitted with the understanding that if the Commission feels it is important to get the testimony of Dr. Pace all parties will be notified and given an opportunity to present medical testimony and also require the applicant Alice Giles to submit to an examination if necessary.

Mr. Benson: I assume that will be done if the Commission considers this girl is a dependent?

Mr. Knerr: Yes. We couldn't consider her a dependent on the record now before us.

[fol. 54] Mr. Knerr: Oh yes, Mr. Benson, it may be that the Commission in order to be fully advised as to the location of the track, may visit the Bountiful Brick Company's yard and view the premises and the place where Mr. Giles was killed, in order that it may be fully advised in its investigation.

End.

Reporter's certificate to foregoing omitted in printing.

[fol. 55] Minute entry of argument and submission, May 12, 1926, omitted in printing.

[fol. 56] IN SUPREME COURT OF UTAH

[Title omitted]

JUDGMENT—November 23, 1926

This matter having been heretofore argued and submitted on the return made to the writ of review issued herein, and the court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the award of the Commission heretofore entered herein be, and the same is, affirmed.

[fol. 57] [File endorsement omitted]

IN SUPREME COURT OF UTAH

[Title omitted]

OPINION—Filed November 23, 1926

CHERRY, J.:

This is a proceeding under the Workmen's Compensation Act to review an award of compensation made by the Industrial Commission to the dependents of Nephi Giles, an employee of the Bountiful Brick Company, who was struck and instantly killed on June 17, 1925, by an electric train operated by the Banberger Electric Railroad Company, while crossing its track on his way to work.

The employer and its insurer, as plaintiffs here, complain of the award and contend that the conclusion of the Industrial Commission that the employee was killed by an accident arising out of or in the course of his employment is not supported in fact or in law. This is the sole question for decision. There is no dispute in the evidence.

The employer operated a brick making plant at Bountiful, Utah, where the deceased was employed as a fireman.

The brick making plant is situated on the west side of and adjoining the Banberger Electric Railroad which runs north and south. A switch or siding of the railroad extends into the plant. East of the railroad track is the main settled portion of the city of Bountiful. So far as shown by the evidence all of the employees of the Brick Company resided east of the railroad track. It was therefore necessary to cross over the railroad track in going to and returning from their work. The right of way of the railroad opposite the brick plant was fenced with wire fences. On the west side and between the right of way and the brick plant there was an opening in the fence between two posts set a few feet apart. The employer's manager testified that men coming from both north and south entered the brick plant through this opening. There was evidence that this was the general point of entrance to and exit from the plant by all employees who resided east of the railroad track. There was no evidence that any employee ever entered at any other point. In going to the plant the employees approached the opening in the fence from various directions. Some from the north, others from the south, and still others from the east who crawled through the fence on the east side of the railroad right of way. They all, however, were required to, and did, either go upon or cross the railroad track opposite or near the opening in the fence, in order to get to the plant. That this was the customary route to and from the brick plant of the employees and that the employer had full knowledge thereof is well established by the evidence.

The deceased employee lived about one and a half miles southeast of the plant. To get to his work he, of necessity, must cross the railroad track. He had been employed at the plant for several years and according to the evidence had followed the route above described in going to and from his work. It was while he was crossing the railroad track opposite the opening in the fence, on his way to work, and when within thirty feet of the employer's premises that he was killed. There is a public road called the Burns road which runs east and west and across the railroad track at a point about two hundred yards south of the brick plant. [fol. 58] This road extends west from the railroad track and connects with a public street which runs north and

along the west side of the employer's premises. Access to the brick plant from the south side is cut off by a deep ditch so that in going to the brick plant along the route of the Burns road and the public street it is necessary to travel around to the west side of the employer's premises and then east to the brick plant. This route was available to the deceased employee, but was about one-half mile greater in distance than the one used by him and other employees. There was no testimony that any employee ever traveled this route in going to or returning from his work. The main contention made by the plaintiffs is that there was a route or way available to the employee along the Burns road and the public street which although greater in distance was less hazardous because the crossing of the railroad track was a public one where the trains must be operated with greater care to avoid accidents and injuries; that the employee by selecting the shorter route, which traversed the private right of way of the railroad, thereby exposed himself to a greater hazard and one not necessarily connected with or contemplated by his employment.

In Cudahy Packing Co. v. Ind. Comm., 60 Utah, 161, 207 Pac. 148 (affirmed — U. S. —, 44 S. C. Rep. 153), commonly referred to as the Parramore case, an award of compensation on account of the death of an employee who was struck and killed while necessarily crossing a railroad track on his way to work, and just before he had reached his employer's premises, was sustained. The proximity of the railroad track to the employer's premises and the necessity of crossing the track daily in going to and from work were in the main reasons for the conclusion in that case that the employment involved peculiar and abnormal exposure to a common peril which was annexed as a risk incident to the employment. The only difference seen in the relevant circumstances of the Parramore case and the case at bar is that in the former the employee had no other choice than to go over the tracks at the place where he was killed, while in this case the employee could have selected the longer route and crossed the track on a public road, where it is urged there was less danger. But we think this not a sufficient reason for distinguishing the latter case from the former.

In essential principles the cases are the same. The employee in the case at bar, in crossing the track at the place where he was killed, did what any reasonable person would do under similar circumstances. The route taken was the most direct and shortest and was used by other employees with the knowledge of the employer who made no objection. The fact that the opening in the fence was allowed by the employer to remain open and be used in view of the situation and surrounding circumstances amounted to an invitation on his part to his employees to use it. With this situation what would be the reasonable and necessary expectation as to the way employees would get to and from their work? Can it be said that the employment of the deceased, under the circumstances, did not necessarily contemplate that he would go to and from his work according as he was invited by the situation and as other employees did? Of course it was possible for the employee to have chosen the longer and perhaps the less dangerous route, but, under the circumstances, no reasonable person would expect him to do so. He traveled over the route which was generally used by other employees—the natural, practical, customary route. That his employment contemplated and included in itself the manner of so going to and from his work is we think a fair and necessary conclusion. The employee in crossing the track at any time was exposed to a peril which is common to all, but by virtue of his employment he was required to cross the track regularly and con- [fol. 59] tinuously, thus being peculiarly and abnormally exposed to a common peril. It is the greater degree of exposure to the peril which arises as an incident to the employment which sustains the causal relation between the employment and the accident.

We think the case is within the principle decided in the Parramore case, and should be ruled accordingly.

The award is affirmed.

We concur:

Valentine Gideon, C. J.; J. E. Frick, J.; S. R. Thurman, J.

[fol. 60] IN SUPREME COURT OF UTAH

DISSENTING OPINION

STRAUP, J.:

I dissent.

The Bamberger railway runs north and south. Its right of way is fenced with posts and five strands of wire. The brickyard where the deceased was employed is west of the right of way. About two hundred yards south of the brickyard is a public highway running east and west crossing the railroad right of way. The deceased lived south of the highway and east of the railroad track. On the morning of the accident he, on leaving his residence to go to work, delivered some eggs at a farmhouse north of the public highway and east of the railroad right of way and about due east of the brickyard. After delivering the eggs he started to go to the brickyard. In going to the farmhouse he traveled on foot either through the field or along another public highway running north and south and east of the railroad right of way. From the farmhouse he, after delivering the eggs, went through a field to the east fence of the railroad right of way at a point a little north of east from the brickyard and there crawled through or between strands of wire and entered upon the railroad right of way and while attempting to cross it was struck by a passing train operated by the railroad company and was killed. He was 74 years of age and hard of hearin. There were no wires down and no opening at the point where the deceased entered the right of way. In the west fence of the railroad right of way at a point a short distance north of the brickyard and about opposite the place where the deceased entered the right of way there was what is spoken of as an opening between two posts caused by the middle wires being down or cut but the top and bottom wires up and in place. There is no claim made that there was any trail or path running easterly and westerly across the railroad right of way, and especially none at the place where the deceased entered the right of way. The brickyard company had not anything to do with maintaining the fence, nor was the opening in the west fence maintained in any sense for the use or benefit of the company or with its consent or acquiescence; nor did the opening exist, nor

was it maintained as a means of egress from and ingress to the premises of the brickyard company. The company had no duties whatever to perform with respect to the fence or to the opening. How, or for what purpose, the opening was occasioned or created, or suffered and permitted to be there, is not disclosed. That it was not done by the brickyard company or by anyone directed or authorized by it, and that it was not created as a means of ingress to or egress from the brickyard, and that the brickyard company had nothing to do in suffering and permitting the opening to be there, were all clearly shown.

Between the brickyard and the highway to the south there was a ditch which because of its depth and not because of water, for there was no water in the ditch, was inconvenient and difficult to cross, but one traveling along the highway on the south, proceeding westerly beyond the end of the ditch a short distance, and then traveling north, had a safe and convenient means to reach the west entrance of the yard. Thus the deceased, ordinarily, in leaving his house well could have traveled north to the public highway running east and west, thence westerly along the highway and across the railroad right of way at the public crossing, then continue westerly along the highway past the ditch and then north to the west entrance of the brickyard. That was the natural and a safe and convenient route. If the deceased had duties to perform at the west entrance or portion of the yard such route was not to any appreciable extent longer than along the public highway to the crossing and then north along the right of way about two hundred yards to the opening in the west fence. If he had duties to perform at the east entrance the latter route was several blocks shorter. Though the natural and safe route was a few blocks longer than the course along or over the right of way, yet that in no particular rendered the natural route inaccessible. The reason given at the hearing was not that the deceased could not have taken the natural and safe route, or that such route was inaccessible, but that the other route was shorter and for that reason more convenient. As to that I do not find any substantial dispute or controversy in the record. I thus do not find anything to support the finding of the Commission that the course pursued by the deceased was the only accessible

[fol. 61] route or means of ingress to or egress from the plant.

The Commission also found that the course pursued by the deceased at the time of his injury and death was a customary route. I do not find sufficient evidence in the record to support that. A witness on behalf of the applicant testified that he saw other employes of the brickyard company travel along the right of way or across it at different places and pass through the opening in the west fence; but when asked how many he saw do that he answered that he saw only two of such employes. The manager of the brickyard company testified that he saw the deceased a number of times going to his work; that his route varied; that it was not always the same, that sometimes he went to the north of the plant and through the opening, sometimes over the Banberger property, and at times he saw him go along the highway to the public crossing then travel north along the railroad right of way to the opening in the fence and go through it, but not as a regular thing; that he saw other employes go along the railroad right of way and through the opening in the fence and that he made no objections, but about a year before the death of the deceased he saw him on the railroad track on an occasion when he barely escaped being struck by a passing train and then warned him and told him to stay off the track. Though other employes were not warned and told to keep off the railroad track, the deceased was. But whether the employees were or were not warned, or whether the brickyard company did or did not object to its employes taking or traveling such course, is, as I think, immaterial for such travel was not on the premises of the brickyard company but was a chosen way by the employes themselves on their way to and from work and before they reached or after they had left the premises of the company. The company did not control or in any way attempt to control the manner or course of travel of any of its employes to or from work. That was left entirely with the individual employe. The course taken by the deceased was not the only course open to him, but was one voluntarily chosen by him as being more convenient because it was shorter. I think on the record it is shown beyond dispute that the course so voluntarily taken by the deceased was not, as

in the case of Cudahy Packing Co. v. Ind. Comm., 60 Utah 161, 207 Pac. 148, the sole means of ingress or egress to or from the place of work, but that there was open to him a natural and safe route which he could have taken but failed to do so, and for his own convenience voluntarily chose a dangerous and unsafe course merely because it was shorter. In the Cudahy Packing Company case the court, after observing that there was no means or way existing by which the employe could go to the plant where he was employed other than the course taken by him, stated:

"If the liability exists, it is by reason of the fact that the plant or manufacturing establishment is so located that there is no other method or means of approach except over railroad tracks or other dangerous places, and that the same are in such close proximity to the plant that the employe has no election or option in determining or selecting his way of approach."

I thus think this case does not come within the Cudahy Packing Company case but is within the rule or doctrine announced in the cases of North Point Con. Irr. Co. v. Ind. Comm., 61 Utah 421, 214 Pac. 22 and Reed v. Lumber Co., 225 Mich. 164, 196 N. W. 420, and that the injury and death of the deceased did not arise out or *or* in the course of his employment. It is clear to me that after he delivered the eggs to his neighbor at the farmhouse, instead of retracing his steps back to the public highway he went through his neighbor's field to the east fence of the railroad right of way and there without license or permission crawled through or between the strands of wire and without right entered upon the private right of way of the railroad company and was killed. I therefore think the award made by the Commission should be set aside.

[fol. 62] IN SUPREME COURT OF UTAH

[Title omitted]

ORDER EXTENDING TIME—Filed December 9, 1926

Upon application of Young, Boyle and Moyle, and good cause therefor appearing, it is ordered that the time in

which to file a petition for a rehearing be, and the same is hereby, extended up to and including the 20th day of December, 1926.

[File endorsement omitted.]

[fols. 63-79] Petition for rehearing, covering 17 pages, filed December 20, 1926, omitted from this print. It was denied and nothing more by order December 27, 1926.

[fol. 80] IN SUPREME COURT OF UTAH

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed December 27, 1926

In this cause it is ordered that the petition for rehearing heretofore filed herein be, and the same is, denied.

[File endorsement omitted.]

[fol. 81] [File endorsement omitted]

IN SUPREME COURT OF UTAH

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed February 5, 1927

To the Honorable S. R. Thurman, Chief Justice of the Supreme Court of the State of Utah:

The petition of the Bountiful Brick Company, a corporation organized and existing under the laws of the State of Utah, and the United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland and duly qualified to do business in the State of Utah, plaintiffs, and

petitioners for a review of the above entitled cause in the Supreme Court of the State of Utah, and hereinafter referred to as petitioners, respectfully shows:

1. That the Bountiful Brick Company owns and operates a brickyard located near Bountiful in the County of Davis and State of Utah; that it is there engaged in the business of manufacturing bricks and has more than three persons in its employment;

2. That the United States Fidelity and Guaranty Company is the Workmen's Compensation Insurance carrier for the Bountiful Brick Company; and that on the 4th day of August, 1925, Elizabeth W. Giles, as widow of Nephi Giles, deceased, for herself and Alice and Mable Giles, daughters of decedent, commenced before the Industrial [fol. 82] Commission of Utah a proceeding against petitioners for compensation on account of the death of the said Nephi Giles arising out of an accident alleged to have occurred during his employment by petitioner, Bountiful Brick Company;

3. That after hearing the allegations and proofs of the parties in said cause the Industrial Commission of Utah, on the 24th day of December, 1925, made an award of compensation to be paid by petitioners to Elizabeth W. Giles, widow of Nephi Giles, deceased, for herself and Alice and Mabel Giles, daughters of decedent, in the sum of $8.65 per week, beginning with the 20th day of June, 1925, for a period of not to exceed three hundred twelve weeks, and also reasonable funeral expenses of one hundred fifty dollars; that thereafter petitioners made an application to the Industrial Commission of Utah for a re-hearing and that the said application was denied on the 13th day of January, 1926;

4. That thereafter, on the 5th day of February, 1926, petitioners filed their petition for writ of review in the Supreme Court of the State of Utah seeking to set aside the said award of the Industrial Commission of Utah; that petitioners in their petition for writ of review contended:

(a) That the award of the Industrial Commission of Utah was in violation of Section One, of the Fourteenth

Amendment to the Constitution of the United States, in that the findings and conclusions and the said award of the said Industrial Commission of Utah in the said cause were unauthorized and unwarranted.

(b) That the Workmen's Compensation Act of Utah, Title 49, Compiled Laws of Utah, 1917, as amended by Chapter 63, Laws of Utah, 1919, and as further amended by Chapter 67 of the Laws of Utah, 1921, and as further amended by Chapters 73 and 80 of the Laws of Utah, 1925, which provides compensation in cases where an employee is killed in an accident "arising out of or in the course of his employment wheresoever such injury has occurred" is contrary to the provisions of Section One, of the Fourteenth Amendment to the Constitution of the United States.

(c) That Section 3113 of the Compiled Laws of Utah, 1917, as amended by Chapter 63 of the Laws of Utah, 1919, as interpreted and applied by the Industrial Commission of Utah in making its said decision and award in favor of the said Elizabeth W. Giles, widow of Nephi Giles, deceased, for herself and Alice and Mabel Giles, daughters of decedent, contravenes Section One, of the Fourteenth Amendment to the Constitution of the United States.

[fol. 83] 5. That the Supreme Court of Utah overruled the said contentions of petitioners, and thereafter, on the 23rd day of November, 1926, filed in the office of the Clerk of the Supreme Court of the State of Utah an opinion affirming the said award of the said Industrial Commission of Utah; that thereafter your petitioners duly applied to the Supreme Court of Utah for a re-hearing of the said cause; that on December 24, 1926, the said Supreme Court entered an order denying the said last mentioned petition for a re-hearing; that the said Supreme Court of the State of Utah is the highest court in the said State of Utah in which a decision of said matter can be had.

6. That, as more fully appears from the record of the proceedings had in this cause, on June 17, 1925, the said Nephi Giles was struck by an electric train of the Bamberger Railroad Company and was instantly killed; that

at the time he was so struck and killed he was walking, as a trespasser, along and upon the private right of way of the Bamberger Electric Railroad Company on his way to work; that at the time of his death the said Nephi Giles was not on the premises of the Bountiful Brick Company and was not engaged in the performance of any of the duties incident to his employment by the Bountiful Brick Company; that the accident which resulted in the death of the said Nephi Giles did not arise out of or in the course of his employment by the Bountiful Brick Company and that the Industrial Commission of Utah was without jurisdiction in the said cause;

7. That under and by virtue of Section 3148 of the said Act creating the said Industrial Commission of Utah the said Commission was a party defendant to said petition for review in the Supreme Court of Utah and appeared therein by the Attorney General of the State of Utah in support of the validity of the award of the said Commission to the claimant herein and said statute under which said award is purported to have been made.

[fol. 84] Wherefore, petitioners pray that a writ of error from the Supreme Court of the United States may issue in this cause to the Supreme Court of the State of Utah for the correction of errors complained of and more fully set forth in the Assignment of Error filed herein, and that the transcript of the records, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of Utah, may be sent to the Supreme Court of the United States as provided by law and for citation and supersedeas to the end that the errors of which your petitioners complain herein and in the Assignment of errors filed herewith may be reviewed and if any errors be found corrected, conformably to the Constitution and the Laws of the United States.

Dated, this 5 day of February, 1927.

Bountiful Brick Company, United States Fidelity and Guaranty Company, by Henry D. Moyle, Young, Boyle & Moyle, Attorneys for Petitioners.

611 Deseret Bank Building, Salt Lake City, Utah.

[fol. 85] IN SUPREME COURT OF UTAH

[Title omitted]

ASSIGNMENT OF ERROR

Now come the Bountiful Brick Company and the United States Fidelity and Guaranty Company, corporations, plaintiffs and petitioners for writ of review in the above entitled cause in the Supreme Court of the State of Utah, hereinafter referred to as plaintiffs in error, and in connection with their petition for writ of error from the Supreme Court of the United States to the Supreme Court of the Sate of Utah say:

That in the record, proceeding, decision and final judgment of the said Supreme Court of the State of Utah in the above entitled matter manifest error has intervened to the prejudice of plaintiffs in error, wherefore they here assign the following errors, to wit:

1. The Court erred in refusing to hold that the provisions of the Workmen's Compensation Act (the Act creating the Industrial Commission of Utah, Section 3071 to Section 3165, inclusive, of the Compiled Laws of Utah, 1917, as amended) Chapter 100 of the Laws of Utah, 1917, as amended by Chapter 63 of the Laws of Utah 1919, and as further amended by Chapter 67 of the Laws of Utah, 1921, and as further amended by Chapters 73 and 80 of the Laws of Utah, 1925, is unconstitutional and contrary to Section One of the Fourteenth amendment to the Constitution of the United States in that the State of Utah by and through [fol. 86] the provisions of said Act assumes and seeks

(a) To deprive plaintiffs in error and other persons of property without due process of law;

(b) To deny to the plaintiffs in error and certain other persons the equal protection of the laws; and

(c) To deprive plaintiffs in error and certain other citizens of the United States of privileges and immunities secured to the citizens of the United States.

2. The Court erred in that its judgment deprives the plaintiffs in error of their property without due process of

law contrary to Section One of the Fourteenth Amendment to the Constitution of the United States, for the reason that Section 3113 of said Act, as amended, which provides that "every such employee who is killed by accident arising out of or in the course of his employment wheresoever such injury has occurred," etc., as construed by the said Court, authorizes the taking of property of the plaintiffs in error without due process of law in that the said section provides compensation to employees (or their dependents) for death or injuries wholly unrelated to their employment and having no causal connection therewith.

3. The Court erred in holding that by said Section 3113, as applied and construed in said cause, plaintiffs in error are not denied the equal protection of the laws.

4. The Court erred in that irrespective of the unconstitutionality or validity of said Act its action in affirming the award of the Industrial Commission of Utah in this cause deprives plaintiffs in error of their property without due process of law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, in that it appears from the proceedings had and the evidence submitted that the said action of the said Court was arbitrary and wholly injudicious and unwarranted and in disregard of the Constitution of the United States and of the Constitution and Laws of the State of Utah.

[fol. 87] 5. The Court erred in that irrespective of the constitutionality and validity of said Act its action as aforesaid in affirming the said award of the Industrial Commission of Utah denied to plaintiffs in error the equal protection of the laws contrary to Section One of the Fourteenth Amendment to the Constitution of the United States.

6. The Court erred in affirming the said award of the Industrial Commission of Utah, thereby depriving plaintiffs in error of their property without due process of law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States in that the evidence submitted conclusively shows that the Industrial Commission in making its said award was wholly without jurisdiction for the reason that the death of Nephi Giles (upon which claim for compensation is based) did not re-

sult from an accident arising out of or in the course of his employment by the Bountiful Brick Company.

By reason whereof, plaintiffs in error pray that the said judgment of the Supreme Court of the State of Utah may be reversed, set aside, and wholly for naught esteemed.

Henry D. Moyle, Young, Boyle & Moyle, Attorneys for the Bountiful Brick Company and United States Fidelity and Guaranty Company Plaintiffs in Error.

611 Deseret Bank Building, Salt Lake City, Utah.

[fol. 88] In Supreme Court of Utah

[Title omitted]

Order Allowing Writ of Error

On reading the petition of the Bountiful Brick Company, a Corporation, and the United States Fidelity and Guaranty Company, a Corporation, for Writ of Error, and the Assignments of Error, and upon due consideration of the record of said cause,

It is ordered that a Writ of Error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Utah, as prayed for in said petition, and that said Writ of Error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioners and plaintiffs in error, the Bountiful Brick Company and the United States Fidelity and Guaranty Company, give security in the sum of Five Thousand ($5,000.00) Dollars; and if said plaintiffs in error shall prosecute said Writ of Error to effect and, if said plaintiffs in error fail to make their plea good, shall answer to the defendants in error for all costs and damages that may be adjudged or decreed on account of said Writ of Error.

[fol. 89] And said plaintiffs in error now presenting a bond in the sum of Five Thousand ($5,000.00) Dollars, with the Massachusetts Bonding and Insurance Company, a Cor-

poration, as Surety, it is ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 5th day of February, 1927.

S. R. Thurman, Chief Justice of the Supreme Court of the State of Utah.

[fol. 90] IN SUPREME COURT OF UTAH

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Utah, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment in the above entitled cause, which is in the State Supreme Court of Utah, before you or some of you, being the highest court of law or equity of the said State of Utah, in which a decision could be had in the said suit between the Bountiful Brick Company, a Corporation, and the United States Fidelity and Guaranty Company, a Corporation, plaintiffs and petitioners for Writ of Error, and Elizabeth W. Giles, as widow and as Guardian of the Persons and Estates of Alice Giles and Mabel Giles, minor children of Nephi Giles, Deceased, and the Industrial Commission of Utah, are defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the State of Utah, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity, or wherein any title, right, privilege or immunity was claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under [fol. 91] said Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said Bountiful Brick Company, a Corporation, and the United States Fidelty and Guaranty Company, a Corporation, as by their complaint appears, we being will-

ing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command, you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the case, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof; that the record and proceedings thereto being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 5th day of February, in the Year of our Lord one Thousand Nine Hundred and Twenty-seven.

John W. Christy, Clerk of the District Court of the United States, for the District of Utah. (Seal of the United States District Court, District of Utah.)

Approved and Allowed by S. R. Thurman, Chief Justice of the Supreme Court of the State of Utah.

Service of above and foregoing Writ of Error accepted this 7th day of February, 1927.

Harvey H. Cluff, Attorney General of the State of Utah, Attorney for the Industrial Commission of Utah, by J. Robt. Robinson, Deputy.

I received the foregoing Writ on the 5th day of February 1927 and on the 7th day of February 1927, I served the same at Bountiful, Utah, on the within named Elizabeth W. Giles, as widow and as Guardian of the Persons and Estates of Alice Giles and Mabel Giles, minor children of Nephi Giles, Deceased, by showing to her this original writ and leaving with her a true copy thereof.

I further certify that at the time of service, I endorsed on said copies, my name, official title and the date of service.

J. Ray Ward, United States Marshal, by H. O. Pack, Deputy.

[fols. 92 & 93] Bond on writ of error for $5,000 approved; omitted in printing.

[fol. 94] Citation, in usual form, showing service on Harvey C. Cluff et al., omitted in printing.

[fol. 95] IN SUPREME COURT OF UTAH

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

The Clerk of the Supreme Court of Utah will please prepare the record upon the Writ of Error in the above cause from the Supreme Court of the United States to the Supreme Court of Utah, and incorporate in said record copies of the following pleadings, notices, appearances, process, orders, documents and certificates as are or may be of record in the above entitled cause:

1. Petition for Writ of Review filed February 6th, 1926;
2. Writ of Review issued February 6th, 1926, and return;
3. Certificate of Service of Sheriff on Writ, filed February 15th, 1926;
4. Complete record as originally filed in the Supreme Court of Utah, February 9th, 1926, certified to by the Secretary of the Industrial Commission of Utah;
5. Opinion of Supreme Court of Utah, affirming the award of the Industrial Commission, filed November 23rd, 1926;
6. Order entered by Supreme Court on December 9th, 1926, extending time to petition for rehearing to December 20th, 1926;
7. Petition for rehearing filed December 20th, 1926;
8. Order entered by Supreme Court on December 27th, 1926, denying the Petition for Rehearing;
9. Petition for Writ of Error from Supreme Court of the United States to Supreme Court of Utah;

[fols. 96 & 97] 10. Assignment of Errors;

11. Order allowing writ of error and supersedeas from Supreme Court of United States to Supreme Court of Utah;

12. Writ of Error showing return with usual certificates from Supreme Court of the United States to Supreme Court of Utah;
13. Supersedeas bond filed on writ of error;
14. Citation and proof of service;
15. Praecipe for record.
16. All record entries in the Supreme Court of Utah.

Henry D. Moyle, Richard W. Young, Ashley D. Boyle,
Attorneys for Petitioners and Plaintiffs in Error,
611 Deseret Bank Bldg., Salt Lake City, Utah.

Service of above and foregoing Praecipe for Record accepted this 10th day of February, 1927.

Harvey H. Cluff, Attorney General of the State of Utah, Attorney for the Industrial Commission, by J. Robt. Robinson, Deputy Attorney General.

[fol. 98] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 99] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFFS IN ERROR OF PARTS OF THE RECORD TO BE PRINTED—Filed March 10, 1927

To the Clerk of the Supreme Court of the United States:

Upon proceedings on error in this cause, the plaintiff in error intends to rely on the following points (which are more fully set forth in the assignments of error herein):

The decision of the Supreme Court of the State of Utah in affirming the award of the Industrial Commission of Utah.

I. Deprives petitioner of its property without due process of law, and

II. Denies to it the equal protection of the laws, because

1. The Commission was wholly without jurisdiction because the accident was not an industrial accident, and did

not result from any hazard of petitioner's business, and was in no way connected with the employment of the deceased.

2. The Workmen's Compensation Act of Utah as construed and applied in this cause is arbitrary, oppressive and unreasonable, and contrary to principles of natural justice.

3. Section 3113 of said act, as construed and applied in this cause, is arbitrary, oppressive and unreasonable in [fol. 100] that it authorized the award of compensation for death resulting from an accident not attributable to the employment of deceased, and not in any way connected therewith.

4. Whether or not the said Act is constitutional and valid, the action of the state court was arbitrary, unreasonable, unjust and oppressive, and in disregard of established law.

Plaintiffs in Error will contend that, under the Federal Constitution a state court or a state legislature may not compel an employer to become the general insurer of the lives and safety of his employees.

Plaintiffs in error request that the following parts of the record in said cause which *it* deems material to the consideration thereof, shall be printed for the use of court and counsel:

1. Affidavit and Petition for Writ of Review filed February 6th, 1926 (Tr. pp. 1-6).

2. Writ of Review issued the 5th day of February, 1926, and return (Tr. pp. 7-12).

3. Certificate of Secretary of Industrial Commission to Transcript (Tr. p. 13).

4. Certified Report of Hearing before Industrial Commission, with Reporter's Certificate (Tr. pp. 29-54).

5. Decision and Order of Industrial Commission (Tr. pp. 21-24).

6. Petition for Re-hearing before Industrial Commission (Tr. pp. 26-28).

7. Denial of Petition for Re-hearing before Industrial Commission (Tr. p. 25).

8. Order of Submission of Supreme Court of State of Utah (Tr. p. 55).

9. Judgment of Supreme Court of State of Utah, filed November 23rd, 1926 (Tr. p. 56).

10. Opinion of Supreme Court of Utah affirming the Award of the Industrial Commission of Utah, filed November 23rd, 1926 (Tr. pp. 57-61).

[fol. 101] 11. Minutes of Supreme Court of Utah, in this cause, on December 9th, 1926, extending time to file Petition for Re-hearing (Tr. p. 62).

12. Petition for Re-hearing filed December 20th, 1926 (Tr. pp. 63-79).

13. Order entered by Supreme Court of Utah on December 27th, 1926, Denying Petition for Re-hearing (Tr. p. 80).

14. Petition for Writ of Error from Supreme Court of United States to Supreme Court of Utah (Tr. pp. 81-84).

15. Order Allowing Writ of Error, etc. (Tr. pp. 88-89).

16. Original Writ of Error filed February 7th, 1927 (Tr. pp. 90-91).

17. Assignment of Errors filed February 5th, 1927 (Tr. pp. 85-87).

18. Supersedeas Bond filed February 5th, 1927 (Tr. 92-93).

19. Citation and return, filed February 7th, 1927 (Tr. p. 94).

20. Praecipe for Record filed February 10th, 1927 (Tr. pp. 95-96).

21. Certificate and return of Clerk of Supreme Court of Utah, to Writ of Error (Tr. p. 98).

Henry D. Moyle, Attorney for Bountiful Brick Company, a Corporation, and United States Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error, whose Postoffice address is #611 Deseret Bank Building, Salt Lake City, Utah.

Received a copy of the within Notice and Directions to the Clerk of the Supreme Court of the United States, this 4th day of March, 1927.

Harvey C. Cluff, Attorney General of the State of Utah, Attorney for the Industrial Commission of Utah, a Defendant in Error, by L. A. Miner, Assistant Attorney General.

[fol. 102] Affidavit of Mailing

STATE OF UTAH,
County of Salt Lake, ss:

Margaret Newman, being first duly sworn, deposes and says:

That she is a clerk in the office of Henry D. Moyle, Attorney for the Plaintiffs in Error, Bountiful Brick Company, a Corporation, and United States Fidelity and Guaranty Company, a Corporation; that the said Henry D. Moyle resides and has his office in Salt Lake City, Utah; and that Elizabeth W. Giles, as Widow and as Guardian of the Persons and Estates of Alice Giles and Mabel Giles, minor children of Nephi Giles, Deceased, one of the defendants in error herein, resides at R. F. D. #1, Woods Cross, Davis County, Utah; that there is regular communication by United States mail between the two Cities of Salt Lake and Woods Cross; that on the 4th day of March, 1927, deponent served a copy of the within and attached Statement of Points Relied on and Directions as to Printing of Record, upon the said Elizabeth W. Giles, one of the defendants in error in this action, by depositing the same properly enclosed in a securely closed and duly postpaid wrapper in the Postoffice of the United States at Salt Lake City, Utah, addressed and directed to the said Elizabeth W. Giles, Woods Cross, R. R. D. #1, Davis County, Utah.

Margaret Newman.

Subscribed and sworn to before me this 4th day of March, 1927. J. M. Christensen, Notary Public, Residing at Salt Lake City, Utah. My Commission Expires Feb. 23, 1930. (Notarial Seal.)

[fol. 103] [File endorsement omitted.]

Endorsed on cover: File No. 32,535. Utah Supreme Court, Term No. 193. Bountiful Brick Company and United States Fidelity and Guaranty Company, plaintiffs in error, vs. Elizabeth W. Giles, as widow and as guardian, etc., and the Industrial Commission of Utah. Filed March 10th, 1927. File No. 32,535.

IN THE

Supreme Court of the United States

October Term, 1927

No. 193

BOUNTIFUL BRICK COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY,

PLAINTIFFS IN ERROR,

vs.

ELIZABETH W. GILES, as Widow, and as Guardian, Etc., and THE INDUSTRIAL COMMISSION OF UTAH,

DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Utah.

BRIEF OF PLAINTIFFS IN ERROR.

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Statement of Case.

This writ of error brings to the attention of this court for review a final judgment of the Supreme Court of Utah (a court of last resort referred to herein as "Utah Court"), affirming an award by the Industrial Commission of Utah (sometimes referred to as "Commission"), that plaintiffs in error pay compensation in the amount of approximately $2,700.00 to the individual defendant in error.

Plaintiffs in error contend that:

> (a) the judgment of the Utah Court and the award of the Commission (irrespective of any statute) and
>
> (b) the Utah Workmen's Compensation Act, as construed and applied in this case,

deprive it of rights guaranteed by the Fourteenth Amendment to the Federal Constitution and are, therefore, unconstitutional and void. These contentions were properly presented to the Utah Court. (Rec. p. 3, Original Rec. p. 63.)

Fundamentally it is the position of plaintiffs in error that:

> (1) the injury complained of did not arise out of an industrial accident, and
>
> (2) that a Workmen's Compensation Law or an award of a Commission purporting to act under it, is unconstitutional and void when attempting to deal with a non-industrial accident.

Plaintiff in Error, Bountiful Brick Company, owns and operates a brick-yard in the town of Bountiful, the entrance to which is on a public highway running east and west across Davis County, and crossing at right angles the State Highway and the line of the Bamberger Electric Railroad Company, operating between Salt Lake City and Ogden.

The record discloses the following uncontradicted facts: That on the 17th day of June, 1925,

Nephi Giles,	a fireman, working during the day (Rec. 23, 26, 43),
on his way to work,	before his employment had begun (Rec. 26, 30),
while trespassing on an Electric Railroad right of way,	and while walking between the rails thereof, over which the employer had no control, and in which it had no interest and contrary to the express warning of the employer (Rec. 41),
was struck by an electric train,	not owned or operated by or for the employer,
and killed,	at a point on said railroad right of way near the boundary line of the premises of the Bountiful Brick Company (Rec. 39);
	that a six or seven-strand barbed wire fence separated said railroad right of way from the employer's premises. (Rec. 30, 32, 35.)

The deceased resided in Val Verda. (Rec. 25.) On the morning in question, he went from his home, carrying eggs to a neighbor. (Rec. 25.) From the neighbor's, to whom he had delivered eggs, he went through the field of another neighbor (Rec. 25, 30), and through or under the barbed wire fence separating said neighbor's land from the railroad right of way, on to and partially crossing the Bamberger Electric Railroad Company's tracks. (Rec. 25, 30.) Deceased could have gone the regular way, along the public highway and across the tracks of the Railroad at a public crossing. (Rec. 28, 31, 33.) He was hard of hearing. (Rec. 34.) He had to spread the strands of the barbed wire running along the Railroad right of way, to get onto

it to cross it. (Rec. 36.) There was no gate on that side of the Railroad right of way. There had been on the far side of the right of way, a fence-post down, but it was nailed up at the time of the injury. (Rec. 36.) Deceased saved one-fourth mile's distance by trespassing through the fields and crossing the Railroad right of way. (Rec. 37.) The route followed by deceased in going to work varied. It was not always the same. (Rec. 40.) There was no regular path at the place deceased was killed. (Rec. 40.) Deceased was cautioned by his employer a number of times to keep off the Railroad tracks.. (Rec. 41, 44.) Deceased should have used the public road. (Rec. 43.) The employer exercised no control over the men as to how they came to work. (Rec. 44.) The route taken by deceased bore no necessary relationship to work or place of work.

The record indicates with certainty that:

Deceased came to his death in an accident:

(a) Not in the course of his employment,

(b) Not arising out of his employment,

(c) Not due to any act or neglect of plaintiffs in error,

(d) Not attributable to any hazard of the business of plaintiffs in error, but to a hazard to which the public generally would be exposed in unlawfully trespassing upon the Railroad right of way.

The accident occurred at a time

(a) When deceased was not on the premises of plaintiffs in error,

(b) Outside the hours of employment of deceased,

(c) When deceased was not engaged in any business of plaintiffs in error.

The accident occurred on the Railroad right of way, as the result of an electric car striking deceased.

Deceased at the time of his death:

(a) Was not crossing at a place regularly used by him in going to work,

(b) Was going to work in a more or less direct course from the home of a neighbor, where he had gone on an errand, before starting on his way to work,

(c) Was not under the control of his employer,

(d) Was not engaged in any business of plaintiffs in error,

(e) Was going across the tracks of said Railroad contrary to the express warning and caution of his employer.

The Railroad right of way was

(a) Not owned or in any way controlled by plaintiffs in error,

(b) Not operated for plaintiffs' accommodation,

(c) Not a right of way over which plaintiffs in error or deceased had any express or implied permission to cross at point of accident.

There is no conflict of evidence as to any material fact.

Section 3113 of the Utah Workmen's Compensation Act, as amended, provides compensation for

"* * * every such employee who is killed by accident arising out of, or in the course of his employment, wheresoever such injury has occurred * * *," etc.*

Upon the foregoing state of facts, Elizabeth W. Giles, as widow of Nephi Giles, deceased, and as guardian of two

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*Sec. 3113, Chap. 100, Laws of Utah, 1917, as amended by Chap. 63, Laws of Utah, 1919, and further amended by Chap. 67, Laws of Utah, 1921. This section is set forth in full in the Appendix.

minor children, was awarded compensation by the Industrial Commission of Utah. (Rec. 13.) The Supreme Court of Utah affirmed the award. (251 Pac. 555, Nov., 1926; Rec. 47.)

Errors Relied On.

We contend (as more fully appears from the assignments of error, Rec. 59), that the judgment of the State Court in affirming the award of the Commission deprives plaintiffs in error of their property without due process of law, and denies to them the equal protection of the laws, and is, therefore, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that

1. The Commission was wholly without jurisdiction to make the award because the accident was not an industrial accident, and was entirely outside the Utah statute, since it did not result from any hazard of plaintiffs in error's business and was in no way connected therewith.

2. Whether or not the Utah statute (or said Sec. 3113 thereof) is constitutional and valid, the action of the State Court was arbitrary, unreasonable, unjust and oppressive, unsupported by evidence and in disregard of established law since it acted contrary to the undisputed evidence and upon an assumption unsupported in facts.

3. Section 3113 of the Utah statute as construed and applied in this case is arbitrary, oppressive and unreasonable in that it authorizes the award of compensation for death resulting from an accident not attributable to the employment of deceased and not in any way connected therewith.

Brief of Argument*

By the construction and application of the State statute by the Commission and by the State Court, this Court is bound. The case is to be considered as though Section 3113 of the Utah statute had, in specific terms, provided for liability upon the precise facts constituting the case at bar.

(See Authorities, Point II, Appendix.)

The question saved in the State Court and presented here is whether the statute, as construed and applied by the State Court, is valid under the provisions of the Fourteenth Amendment.

The test to be applied to the judgment of the Court is not what the Court says, but what the Court does. Even if a court lays down correct principles it may not then, upon undisputed facts, arbitrarily disregard them.

Under the Utah statute, the Industrial Commission does not have a general jurisdiction. It may award compensation for industrial accidents arising out of the relation of employer and employe, but that is the limit of its jurisdiction. Sec. 3113, Utah Statute, this brief, Appendix, pp. vii)** The Commission has no jurisdiction over ordinary tort claims. In the instant case, the Commission had no more jurisdiction over the claim of defendants in error than it would have had if deceased had been struck down by a vehicle upon the public streets of Salt Lake City. Mere proximity of the scene of the accident to the pre-

*Authorities in support of contentions of plaintiffs in error are cited in the Appendix to this brief.

**Secs. 3110-3113, 3130, Chap. 100, Laws of Utah, 1917, as amended by Chap. 63, Laws of Utah, 1919, and further amended by Chap. 67, Laws of Utah, 1921. These sections are set forth in the Appendix.

mises of the employer, could not give it jurisdiction or fasten liability on plaintiffs in error.

The action of the Utah Court in affirming the award of the Commission was arbitrary and baseless, because the death of the deceased did not result from any injury arising out of, or received in the course of, his employment.

In Cudahy Packing Company v. Parramore, 263 U. S. 418, 423, this court holds:

> "Where an accident is in no manner related to the employment, an attempt to make the employer liable would be clearly unreasonable and arbitrary as to subject it to the ban of the Constitution."

The case at bar comes clearly within the rule laid down in Bell's case, 238 Mass. 46; 130 N. E. 69:

> "In the present case, admittedly, the general public had no right to cross the railroad track at the place of the accident. The Chemical Company acquired no such right for its officers, employees, or others. Bell's contract of employment did not provide that he was to be considered in the employer's service while crossing the railroad tracks in going from the factory to his home. No such term can be read into the contract by implication, based on the failure of the Chemical Company to provide other ways to and from the factory that were convenient and safe. It is not to be inferred that the Company assumed to give Bell a right to cross the railroad location which its own officers could not use except as trespassers. In short, he acquired no such right from his contract of service. It follows that the employee was on his own business, and not that of his employer, when he was injured on the railroad track. His contract did not contemplate, nor was he in fact engaged in, any service for the employer at that place. The risk from which he suffered was not a risk of his employment. The train which injured him was not owned by the Chemical Company,

and was not connected with its business, nor with the work for which Bell was employed."

To the same effect is—the case of De Constantin v. Commission, 75 W. Va. 32; 83 S. E. 89:

> "If the employee, at the time of the injury, has gone beyond the premises of the employer, or has not yet reached them and has chosen his own place or mode of travel, the injury does not arise out of or in the course of his employment, nor is it within the scope thereof."

Again, in the case of Terminal R. Ass'n. of St. Louis v. Industrial Commission, 309 Ill. 203; 140 N. E. 828, it is said:

> "Where an employee is engaged in a voluntary act not accepted by or known to his employer and outside the duties for which he is employed, and is injured, it cannot be said that his injury arose out of his employment. Where an employee chooses to go to a dangerous place where his employment does not necessarily carry him, and where he incurs a danger of his own choosing and one altogether outside any reasonable requirement of his employment, it cannot be said that such risk was an incident to his employment."

Dambold v. Industrial Commission, 323 Ill. 377; 154 N. E. 128:

> "The cases cited by counsel for defendant in error in support of their contention that an employee, killed while going to his work, is within the scope of his employment when killed, have been so decided on the ground that the employer required a particular route to be traveled, or the route followed was the only one open to the employee. The deceased in this case was left to his own choice of a method of reaching his place of employment. He chose to take a route more dangerous than that afforded to the public. When an employee chooses to go over a

> route of this character, it cannot be said that his act in so doing was incident to his employment."

Reed v. Bliss & Van Oukan Lumber Co., 225 Mich. 164; 196 N. W. 420:

> "In the instant case, deceased had finished his work for the week and had drawn his pay. He owed no duty to his employer until the following Monday. He was pleased to go where he pleased and as he pleased. He left the employer's premises by means entirely of his own choosing over which the employer had no control. Moving over the street, he was struck by an engine, an instrument over which the employer likewise had no control. Under these circumstances, I think it should be said as a matter of law that the accident did not arise out of decedent's employment and that it was not in the course thereof."

(See other cases cited under Points I and III, Appendix.)

There is no causal connection between the injury and the business in which the deceased employee was engaged.

St. Louis & O'Fallon Coal Co. v. Industrial Commission, 325 Ill. 574; 156 N. E. 764:

> "It has long been the established rule in this State that, where an employee in going to his work chooses a route more dangerous than that afforded to the public or by his employer, or places himself in a dangerous place where his employment does not necessarily carry him, and where he incurs a danger of his own choosing outside of the reasonable requirement of his employment, the risk arising from such act cannot be said to be incident to his employment."

The one fact relied upon by this court in its opinion, in the Cudahy v. Parramore case (*supra*), forming a connection between employer and employee, substantially contributing to the injuries resulting in his death, was:

> "Here the location of the plant was at a place so situated as to make the customary and only practicable way of immediate ingress and egress one of hazard. Parramore could not, at the point of the accident, select his own way."

No such fact can be found in the case at bar.

The following statements of the Chairman of the Utah Commission, in his dissenting opinion (Rec. 18), present clearly the distinguishing facts as shown by the evidence:

> "1. Parramore was killed in the act of making a direct crossing where he had a right to cross and was expected to cross in going to and coming from his work; at a point where the engineer in charge of the engine is charged regularly with exercising the greatest precaution in order to avoid a collision with objects on the crossing; on the other hand, Giles was killed one-fourth of a mile from the nearest point where he had a legal right to cross and where the motorman is not charged with the same degree of care as is the case at the crossing.
>
> 2. Parramore had a right to be where he was killed; Giles did not.
>
> 3. Parramore was in the act of making a direct crossing and proceeding directly to his work; Giles was walking upon the track (not crossing it) and away from his work at the Bountiful Brick plant.
>
> 4. Parramore was committing no trespass; Giles was."

The Utah Court has repeatedly held that employees on their way to and from their place of employment are not protected by the Act.

The undisputed facts in the case at bar bring it within the rule of these cases:

In North Point Consolidated Irrigation Company v. Industrial Commission of Utah, 61 Utah 421, 214 Pac. 22, the Utah Court held:

"We are of the opinion that in view of the undisputed evidence in this proceeding, the plaintiff's contention is sound and should prevail. The courts have had frequent occasion to pass upon the question of whether an injury which is received by an employee while he is on his way either in going to or coming from the place of work, *where he travels upon his own initiative and on his own time and chooses his own conveyance*, comes within the industrial act and entitles the employee to compensation. * * * The case at bar, however, does not come within the doctrine which is referred to nor within the doctrine announced in the Cudahy Company (Parramore) case. Here Singleton chose his own means of conveyance and traveled upon streets of his own selection. Under the circumstances, he was certainly doing nothing while traveling upon the streets in furtherance of his employment and was in no way under the direction of his employer. The accident causing Singleton's injury, therefore, did not arise in the course of his employment nor did it arise out of it. The award of the Commission, therefore, is not sustained by any substantial evidence and furthermore is contrary to law."

Covey-Ballard Motor Company v. Industrial Commission, 64 Utah 1, 227 Pac. 1028. The Utah Court says:

"The legal question for determination is as stated in petitioner's brief, 'did the accident suffered by applicant arise out of or in the course of his employment? * * * The applicant was riding in his own car. *He selected his own route.* He had no prospective purchaser in view and none in mind, but was simply going home after his day's work. These facts lead to but one conclusion, viz., that he was on his way home from his employment and that the accident did not arise out of his employment, nor in the course of his employment.'"

(See Authorities in Point IV, Appendix.)

The opinion of the Utah Court (Rec. 49) recognizes one difference between the facts in the case at bar and those of the Parramore case:

> The only difference seen in the relevant circumstances of the Parramore case and the case at bar is that in the former the employee had no other choice than to go over the tracks at the place where he was killed, while in this case the employee could have selected the longer route and crossed the track on a public road, where it is urged there was less danger."

There was a natural safe way for deceased to have gone from his home to his work, without having trespassed upon the Railroad right of way.

The dissenting opinion filed in the Utah Court, in setting forth the undisputed facts, says in part (Rec. 52-54):

> "Thus the deceased, ordinarily, in leaving his house well could have traveled north to the public highway running east and west, thence westerly along the highway and across the railroad right of way at the public crossing, then continue westerly along the highway past the ditch and then north to the west entrance of the brick-yard. That was the natural and safe and convenient route. * * * It is clear to me that after he delivered the eggs to his neighbor at the farmhouse, instead of retracing his steps back to the public highway he went through his neighbor's field to the east fence of the railroad right of way and there without license or permission crawled through or between the strands of wire and without right entered upon the private right of way of the railroad company and was killed."

It has always been the fundamental principle in the administration of our law, that a right cannot grow out of or be predicated upon the commission of a tort.

It is axiomatic, "that one cannot profit by his own wrong."

In trespassing upon the private right of way of the Railroad at the time of his death, Nephi Giles was committing a wrong, between the commission of which and his employment there was no causal connection. (See Authorities cited under Point III, Appendix.)

It is not due process of law to recognize a trespass upon the private property of another, as a basis to impose upon an employer, who has no control over said private property, a liability in favor of the trespasser. At the time of the trespass, deceased was returning from a private errand. This required deceased to go for a distance in a direction opposite from his work. The course deceased chose in going from the house of the neighbor to the place of his employment was one of his own choice. It bore no relationship to nor was it connected with, in any way, his employment.

Leveroni v. Travelers' Ins. Co., 219 Mass. 488; 107 N. E. 349:

> "The undisputed material facts show that the deceased employee, while returning home at the close of the day's work, entered upon a railroad track where he was struck by a train and killed. And the question for decision is whether the injury arose out of or in the course of his employment. * * * If he had chosen to use the public ways and had been injured by a defect or passing vehicle, the administrator could not recover against the employer, because there would be no causal connection between the conditions of employment and the injuries suffered. * * * The principle is the same and equally applicable where the employee uses a private way or crosses the land of another, either as licensee or trespasser."

(See Authorities, Point I, Appendix.)

The employment of the deceased did not involve a peculiar or abnormal exposure to a common peril, nor was any such exposure to peril annexed as a risk incident to his employment. The deceased exposed himself to an entirely unnecessary peril of his own selection, when he crawled between the strands of the barbed wire stretched along the Railroad right of way to keep trespassers out. No duty to his employer required the assumption of this wrongful act. His status as an employee did not involve or contemplate the trespass. It was his own voluntary act, for which he alone was responsible. To fix a liability upon the employer for the death of an employee, resulting from an act of the employee wholly disassociated from his employment, not arising in any way out of the employment, but on the contrary, the result of a voluntary unlawful act of the employee, deprives the employer of property without due process of law.

The imposition of such a liability upon an employer is unreasonable, unjust, oppressive, unsupported by competent, or any, evidence, and in disregard of established law.

HENRY D. MOYLE,
Attorney for Plaintiffs in Error.

APPENDIX.

Points and Authorities.

I.

Injuries to employees, going to, returning from or after leaving on personal errands, place of employment, are not compensable.

Dambold v. Industrial Commission, 323 Ill. 377; 154 N. E. 128.

St. Louis & O'Fallon Coal Co. v. Industrial Commission, 325 Ill. 574; 156 N. E. 764.

United Disposal & Recovery Co. v. Industrial Commission, 291 Ill. 480; 126 N. E. 183.

Terminal R. Ass'n of St. Louis v. Industrial Commission, 309 Ill. 203; 140 N. E. 827.

Polko v. Taylor-McCoy Coal and Coke Co., 289 Penn. 401; 137 Atl. 625.

Whitney v. Hazard Lead Works, 105 Conn. 512; 136 Atl. 105.

Georgia Ry. & Power Co. v. Clore, 34 Ga. Appeals 409; 129 S. E. 799.

London Guaranty & Accident Co. v. Smith, Tex., Dec. 9, 1926; 290 S. W. 774.

Industrial Commission of Colorado v. Enyeart, Colo., May 31, 1927; 256 Pac. 314.

Ditzler Poultry Co. v. Forsythe, Ind., April 29, 1927; 156 N. E. 406.

McKenzie v. Industrial Commission of Ohio, Ohio, Jan. 29, 1926; 155 N. E. 704.

Simonds v. Reigel, 165 Minn. 458; 206 N. W. 717.

Paulauskis' Case, Me., Jan. 24, 1927; 135 Atl. 824.

Kinslow's Case, Me., April 1, 1927; 136 Atl. 724.

Reed v. Bliss & Van Oukan Lumber Co., 225 Mich. 164; 196 N. W. 420.

Kent v. Virginia-Carolina Chemical Co., 143 Va. 62; 129 S. E. 330.

Devoe v. New York State Ry., 218 N. Y. 318; L. R. A. 1917-A 250.

Norris v. New York C. R. Co., 220 App. Div. 359; 221 N. Y. S. 569.

McMahon v. B. T. & J. J. Mack, 222 N. Y. S. 79; 220 App. Div. 375.

Leveroni v. Travelers' Ins. Co., 219 Mass 488; 107 N. E. 349.

Bell's Case, 238 Mass. 46; 130 N. E. 67.

Mazeffe v. Commission, 106 Kans. 796; 189 Pac. 917.

De Constantin v. Commission, 75 W. Va. 32; 83 S. E. 88.

Covey-Ballard Motor Co. v. Industrial Commission, 64 Utah 1; 227 Pac. 1028.

North Point Consol. Irrigation Co. v. Industrial Commission, 61 Utah 421; 214 Pac. 22.

Harris v. Henry Cheney Hammer Corp., 221 App. Div. 205; 223 N. Y. S. 738.

Clapp's Parking Station v. Ind. Acc. Comm., 51 Cal. App. 624; 197 Pac. 369.

II.

This case is to be considered as though the Utah statute had, in specific terms, provided for liability upon the precise facts constituting the case at bar.

The Cudahy Packing Company v. Parramore, 263 U. S. 418, 422; 68 L. Ed. 366.

Ward v. Krinsky, 259 U. S. 503, 510; 66 L. Ed. 1033; 28 A. L. R. 1207; 42 Sup. Ct. Rep. 529.

III.

Industrial Acts do not protect workmen while crossing railroad private rights of way, in going to and coming from their places of employment.

Dambold v. Industrial Commission, 323 Ill. 377; 154 N. E. 128.

Leveroni v. Travelers' Ins. Co., 219 Mass 488; 107 N. E. 349.

Terminal R. Ass'n. of St. Louis v. Industrial Commission, 309 Ill. 203; 140 N. E. 827.

St. Louis & O'Fallon Coal Co. v. Industrial Commission, 325 Ill. 574; 156 N. E. 764.

Georgia Ry. and Power Co. v. Clore, 34 Ga. Appeals 409; 129 S. E. 799.

Bell's Case, 238 Mass. 46; 130 N. E. 67.

IV.

The Utah Court has repeatedly held that injuries to employees on their way to and from their place of employment do not arise out of or in the course of their employment and therefore not compensable.

Covey-Ballard Motor Company v. Industrial Commission, 64 Utah 1; 227 Pac. 1028.

North Point Consol. Irrigation Co. v. Industrial Commission, 61 Utah 421; 214 Pac. 22.

Cudahy Packing Co. v. Industrial Commission, 60 Utah 161; 207 Pac. 148.

SECTIONS OF UTAH WORKMEN'S COMPENSATION LAW OF STATE OF UTAH, REFERRED TO IN BRIEF OF PLAINTIFFS IN ERROR.

Chapter 100, Laws of Utah, 1917, as Amended by Chap. 67, Laws of Utah, 1919, and further amended by Chap. 67, Laws of Utah, 1921:

Section 3110. (As amended by Chap. 63, Laws of 1919.) The following shall constitute employers subject to the provisions of this title:

(1) The state and each county, city, town and school district therein.

(2) Every person, firm and private corporation, including every public utility, that has in service three or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic servants; provided, that employers who have in service less than three employes and employers of agricultural laborers and domestic servants shall have the right to come under the terms of this title by complying with the provisions thereof, and all the rules and regulations of the commission.

The term "regularly," as herein used, shall include all employments, whether continuous throughout the year or for only a portion of the year. It means all employments in the usual course of the trade, business, profession or occupation of an employer.

Where any employer procures any work to be done wholly or in part by him by a contractor over whose work he retains supervision or control, and the work so procured to be done is a part or process in the trade or business of said employer, then such contractor and all persons employed by him, and all sub-contractors under him, and all

persons employed by any such sub-contractors, shall be deemed, within the meaning of this section, employes of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor, shall be deemed an employer within the meaning of this section. The words "independent contractor," as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another and while so engaged is independent of the employer in all that pertains to the execution of the work is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design.

Section 3111. (As amended by Chap. 63, Laws of 1919.) The terms "employe," "workmen" and "operative," as used in this title, shall be construed to mean:

(1) Every person in the service of the state, and of every county, city, town or school district, including regular members of lawfully constituted police and fire departments of cities and towns, under any appointment or contract of hire, express or implied, oral or written, except any elective official of the state, or of any county, city, town or school district therein, or other official receiving more than $2,400.00 per year salary.

(2) Every person except agricultural laborers and domestic servants in the service of any employer, as defined in subdivision 2 of Section 3110, who employs three or more workmen or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, including aliens and also including minors who are legally permitted to work for hire under the laws of the state, but not including

any person whose employment is but casual and is not in the usual course of trade, business or occupation of his employer.

All lessees in mines or of mining property, and the employes and contractors of all such lessees who are engaged in the performance of work which is a part or process in the business that is being actually conducted by the lessor, and over whose work the lessor retains supervision, or control, shall be deemed, within the meaning of this section, employes of such lessor drawing such wages as are paid employes for similar work; provided, that the lessor may deduct from the proceeds of ores mined by the lessees the premium required to be paid.

Section 3112. (As amended in 1919 and 1921.) The following terms as used in this title shall be construed as follows:

(1) The term "order," shall mean and include any decision, rule, regulation, direction, requirement, or standard of the commission, or any other determination arrived at or decision made by such commission.

(2) The term "general order," shall mean and include such order as applies generally throughout the State to all persons, employments or places of employment of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

(3) The term "welfare," shall mean and include comfort, decency and moral well-being.

(4) The term "safe" and "safety," as applied to any employment or a place of employment, shall mean such freedom from danger to the life, health, safety or welfare of employes as the nature of the employment will reasonably permit.

(5) The words "personal injury by accident arising out of or in the course of employment" shall include an injury

caused by the wilful act of a third person directed against an employe because of his employment.

They shall not include a disease except as it shall result from the injury.

(6) The term "compensation" shall mean the compensation and benefits provided for in this title.

(7) The term "award" shall mean the finding or decision of the commission as to the amount of compensation due any injured or the dependents of any deceased employe.

(8) The term "average weekly earnings" shall mean the average weekly earnings arrived at by rule provided in Section 3142.

Section 3113. (As amended by Chap. 63, Laws of 1919.) Every employe mentioned in Section 3111, who is injured and the dependents of every such employe who is killed by accident arising out of, or in the course of his employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, shall be entitled to receive, and shall be paid such compensation for loss sustained on account of such injury or death and such medical, nurse and hospital services and medicines, and such amount of funeral expense, in case of death, as is herein provided.

Section 3130. (As amended by Chap. 63, Laws of 1919.) Any employe whose employer has failed to comply with the provisions of Section 3114 hereof, who has been injured by accident arising out of or in the course of his employment, wheresoever such injury has occurred, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceeding against his employer by civil action in the courts, as provided in the last preceding section, file his application with the commission for compensation in accordance with the terms of this title, and the commission shall hear and determine such application for compensation in like manner as in other

claims before the commission; and the amount of compensation which said commission may ascertain and determine to be due to such injured employe, or his dependents in case death has ensued, shall be paid by such employer to the persons entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the commission.

FILED
JAN 16 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 193

BOUNTIFUL BRICK COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiffs in Error,

vs.

ELIZABETH W. GILES, as Widow and as Guardian, etc., and THE INDUSTRIAL COMMISSION OF UTAH, Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

SAMUEL H. HOWOVITZ,
of the Boston Legal Aid Society,
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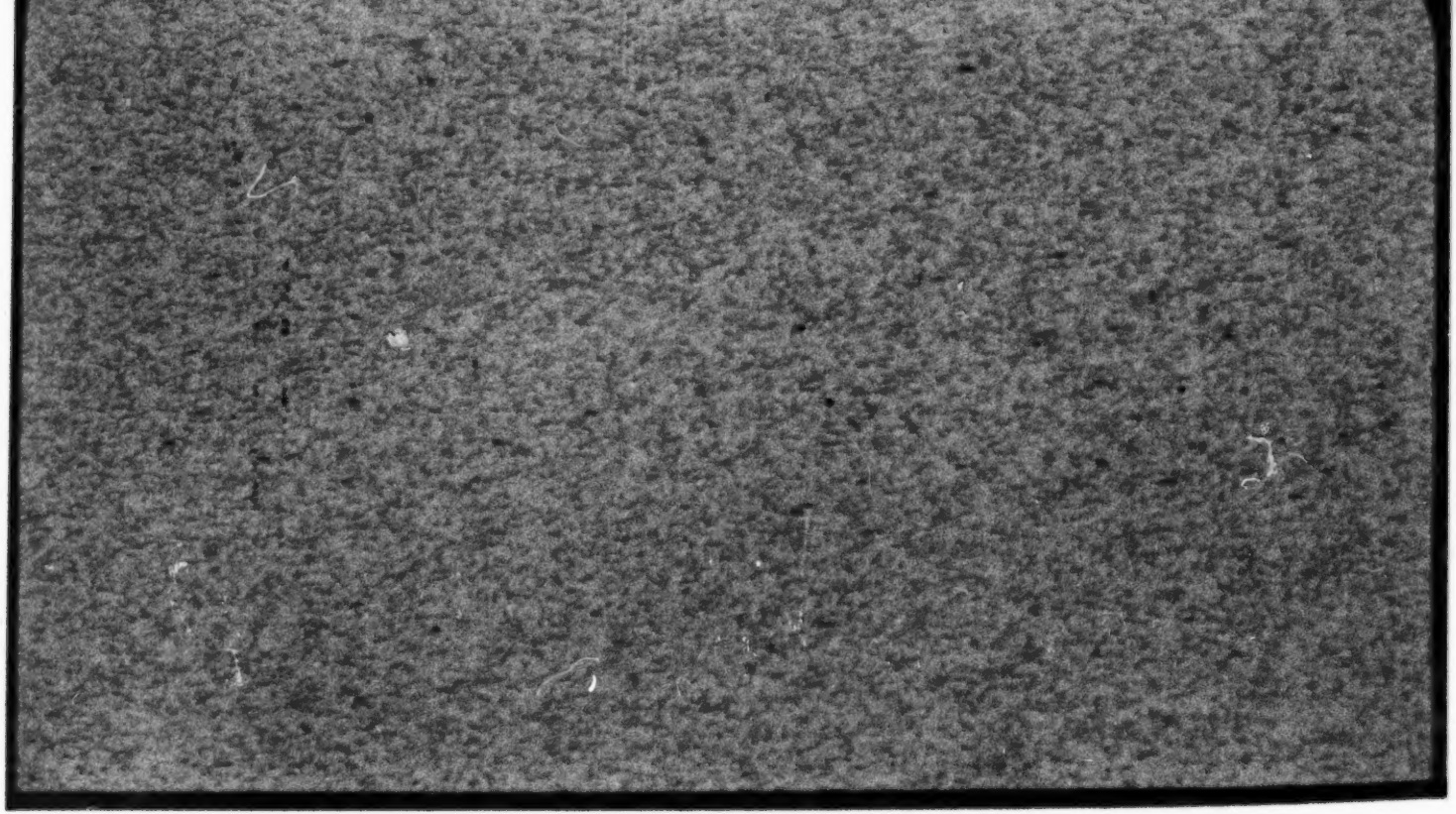
CHARLES H. HOUSTON,
Of Counsel.

(32,535)



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IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF FOR THE DEFENDANTS IN ERROR.

Statement of the Case as to Jurisdiction.

This case comes before the Supreme Court of the United States, on a writ of error to the Supreme Court of the State of Utah.

In brief, the employer and insurer, acting together, allege that the award of the Utah Commission, in favor of the widow and children, as affirmed by the Supreme Court of Utah

> "deprive it of rights guaranteed by the Fourteenth Amendment to the Federal Constitution"

in that it

> "deprives plaintiffs in error of their property without due process of law, and denies them the equal protection of the laws."

(See R., pp. 59, 60, and brief of plaintiffs in error, pp. 1, 5.)

Statement of Facts.

Succintly stated, the facts as found by the Commission, and supported by the evidence, are as follows: The employer carried the usual Utah compensation policy, under which dependents were to receive stated amounts when an

> "employee * * * is killed by accident arising out of or in the course of his employment, wheresoever such injury has occurred."
>
> Compiled Laws, Utah, 1917, sec. 3113, and amendments, Laws, Utah, 1919, c. 63, Laws Utah, 1921, c. 67.

Nephi Giles, while en route to work at the brick plant, adjacent to a railway, had to cross said railway, and when near an improvised gate, being the customary entrance to his employer's premises, was struck and killed by a train. The Commission specifically found

> "He was using this way of entrance at the time of the accident and owing to the peculiar location of the plant and its surroundings, the decedent used the natural, reasonable, and customary route to work" (R., p. 15).

There was evidence that the only other route, crossing the track at a public road, would cause the employee to go one-half to three-fourths of a mile further, was "an unreasonable distance," and was not used by employees living east of the plant, as Giles did. (See R., pp. 13-17, decision and findings of the Industrial Commission of Utah, and see, also, R., pp. 47-50, opinion of the Supreme Court of Utah, per Cherry, J.)

Both the Commission and the State Supreme Court held that on the facts of the instant case, the dependents were entitled to compensation, and that the case was not distinguishable from the decision of this Court in the case of

> Cudahy Packing Company of Nebraska *vs.* Parramore *et al.*, 263 U. S., 418 (decided December 10, 1923).

On the other hand, the theory of the plaintiffs in error is that a distinction should be drawn between the Parramore case, *supra*, and the case at bar on the ground that

(1) In the Parramore case the injury occurred at a public crossing;

(2) In the case at bar the injury occurred on a non-public crossing.

Summary of the Argument

The defendants in error submit that the judgment of the Supreme Court of the State of Utah should be in all respects affirmed, and that the attempt of the plaintiffs in error to distinguish the instant case from the Parramore case, *supra*, draws a distinction without a difference in law.

In support of their contentions, the defendants in error will maintain the following propositions:

1. The Supreme Court of the United States is bound by the construction and application of the Utah compensation statute placed thereon by the Supreme Court of the State of Utah.

2. The only inquiry is whether the compensation statute, as thus applied and enforced in the instant case, violates the Fourteenth Amendment.

3. There being a causal connection between the accident and the employment, there is no constitutional objection, and the decision of the State Supreme Court must be affirmed.

ARGUMENT.

I.

The Supreme Court of the United States is bound by the construction and application of the Utah Compensation Statute placed thereon by the Supreme Court of the State of Utah.

It is now well settled that when a compensation matter comes before this Court on a writ of error, as in the instant case, this Court considers the case as if the compensation statute had in precise language covered the instant case. Thus Mr. Justice Sutherland, speaking for the majority of the court, in Cudahy Packing Company of Nebraska *vs.* Parramore, *supra*, at page 422, says:

> "By this construction and application of the statute [by the Supreme Court of the State of Utah] we are bound and the case must be considered as though the statute had in specific terms, provided for liability upon the precise facts hereinbefore recited."

To the same effect, see

Ward & Gow *vs.* Krinsky et al., 259 U. S., 503, at p. 510.

Red Cross Line *vs.* Atlantic Fruit Co., 264 U. S., 109, at p. 120.

It may be that the justices of this Court, had they been sitting on the Utah court, would have reached a

different construction of the Utah compensation statute. But the question of the proper construction of the statute is now forever foreclosed, provided there is some causal relation between the employment and the accident complained of.

Some States on facts identical with the Parramore case would have come to the opposite conclusion reached by the Utah court. And in fact, Massachusetts did so in

Leveroni *vs.* Travelers' Insurance Company, 219 Mass., 488.

Bell *vs.* Case, 238 Mass., 46.

But numerous other States follow the Utah construction, as see the cases cited at length by Mr. Justice Sutherland in the Parramore case, *supra*, pp. 424-425, especially

Procaccino *vs.* E. Horton & Sons, 95 Conn., 408.

And on a writ of error, this Supreme Court must and does follow the State construction.

Hence so much of the argument of the plaintiffs in error as deals with what the Utah court should have held, has no place before the Supreme Court of the United States.

II.

The only inquiry is whether the Compensation Statute, as thus applied and enforced in the instant case, violates the Fourteenth Amendment.

In the Parramore case, *supra*, at p. 422, this Court distinctly pointed out that

> "the only inquiry we need make is whether it is constitutional as applied and enforced in respect of the facts of the instant case. See Dahnke-Walker Milling Company *vs.* Bondurant, 257 U. S., 282, 288-289."

The court goes on to point out that the statutes like the Utah compensation statute, upon their face, are constitutional; that they are not open to constitutional objection because they abrogate common law defenses or impose liability without fault. See the Parramore case, *supra*.

III.

There being a causal connection between the accident and the employment, there is no constitutional objection, and the decision of the State Supreme Court must be affirmed.

The only serious question that should be legitimately raised in the case at bar is whether there is any causal connection between the accident and the employment.

It may be assumed that if a compensation statute tries to twist a pure tort case, unrelated to any employment, into a compensation case, it would be so arbitrary as to violate the due process of law clause.

> "but where the accident has any such relation we should be cautious about declaring a State statute creating liability against the employer invalid upon that ground." The Parramore case, *supra*, at p. 423.

Or, to state the matter in a different way, the State court's decision should be affirmed unless, beyond a reasonable doubt, there is no causal connection between the accident and the employment.

See Ward & Gow *vs.* Krinsky, *supra*, at p. 520, where Mr. Justice Pitney, speaking for the court, said:

> "The legislature, in the New York system, is justified in extending the benefits of the Compensation Law as far as it reasonably may determine occupational hazard to extend—to the 'vanishing point'—as it were."
>
> "It is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory though it need not be the sole or proximate cause. Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern (Mountain Timber Co. *vs.* Washington, 243 U. S., 239) to escape condemnation as arbitrary, capricious, or clearly unreasonable. Whether a given accident is so related or incident to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case."
>
> Parramore case, *supra*, at pp. 423, 424.

And there is a clear causal relationship in the case at bar, for

(1) The location of the plant was at a place so situated as to make the customary and only practicable way of immediate ingress and egress one of hazard. Giles had to cross that particular railroad track, and the Commission expressly found that he "used the natural, reasonable and customary route to work" (R., p. 15).

Were it not for the peculiar location of the plant, Giles would never have crossed that railroad track. The only place anyone would go to, west of the track, was to the isolated brick plant. It was his employment that forced him to subject himself to the hazard of being struck by a train, and the only way he could avoid the menace was to give up his employment.

(2) Regularly and continuously for years, he had to cross those very tracks, resulting in a degree of exposure beyond that to which the general public was subjected, a peculiar and abnormal exposure as to Giles and all other employees similarly situated.

(3) Giles was in effect invited by his employer to cross the railroad tracks at or near the place of the actual accident, for (to quote the language of the Supreme Court of Utah, R., pp. 48-50),

> "On the west side and between the right of way and the brick plant there was an opening in the fence between two posts set a few feet apart. * * * There was evidence that this was the general point of entrance to and exit from the plant by all employees who resided east of the railroad track. There was no evidence that any employee ever entered at any other point. * * *

> That this was the customary route to and from the brick plant of the employees and that the employer had full knowledge thereof is well established by the evidence. * * * The employee in the case at bar, crossing the track at the place where he was killed, did what any reasonable person would do under similar circumstances. The route taken was the most direct and shortest and was used by other employees with the knowledge of the employer who made no objection. The fact that the opening in the fence was allowed by the employer to remain open and to be used in view of the situation and surrounding circumstances amounted to an invitation on his part to his employees to use it."

The fact that there was another route, along the public road, an unreasonable distance out of the way, is immaterial, for

(1) While it was possible for the employee to have used the longer route, "no reasonable person would expect him to do so" (R., p. 50, opinion of Supreme Court of Utah).

(2) This very defense was raised in the Supreme Court of the United States and was overruled in Ward & Gow v. Krinsky, *supra*, at pp. 511-512. There Krinsky worked in a subway booth, and instead of traveling up two flights to empty water used incidentally to his work, he stepped across the platform, emptied the water on the track, and was accidentally hit by a subway train. The employer argued that he should have chosen the safer place by going up two flights; but this Court properly said:

> "True, he might have avoided that particular hazard that overtook him, had he chosen the tedious journey two flights up and down again, instead of the half-dozen steps across the platform to the edge of the track. Whether, in the hurry and bustle of a subway crowd, the nature of Krinsky's duties required or permitted him to follow the slower course, or even that it involved less probability of personal injury than the one habitually adopted, are questions upon which the commission and the State courts are peculiarly fitted to draw correct inferences. Certainly, we are not warranted in holding that the findings are without support in the evidence."

And the Connecticut Court approved the shorter route theory of crossing the tracks in Procaccino v. E. Horton & Son, *supra*, at p. 412, which case is cited with approval by this Court in the Parramore case.

The fact that the employee was crossing the tracks at a place where there was no public road crossing does not differentiate the case from the Parramore case, for

(1) If anything, the hazard of crossing at the particular point of injury was greater than at a public crossing, as he did not have the benefit of a gate tender or other usual protection found at public crossings;

(2) And the crossing was absolutely necessary due to the employment and location of the plant by the employer;

(3) The implied invitation of the employer is found in his maintaining and permitting an improvised gate

or opening on the west side of the tracks, which gate or opening was connected to the plant by a high and dry elevated road, as well as by a spur-track road near by, and by the employer's failure to give his employees a safer means of entrance elsewhere to the plant;

(4) there is no question of trespasser in the instant case, for

(*a*) there is nothing in the findings and decision of the majority opinion of the Commission or the Supreme Court of Utah to justify a statement that the employee was a trespasser. The word is not even used;

(*b*) and, further, the defense of trespass is not open to the employer, but is available only to the railroad, which is not a party to the instant case. Thus in Daltry *vs.* Media, 208 Pa., 403, at 412, the court states:

> "If it is to be conceded that the boy was technically a trespasser as against Mr. Darlington, who owned and was in possession of the premises, he was not a trespasser against the defendant company, who had neither the possession nor the right of possession of the property."

See, also, 29 Cyc., 443, and cases there cited; and O'Neil *vs.* National Oil Co., 231 Mass., 20, at p. 27, where the court said:

> "Even if she were on the lawn and not on the driveway, and at the time was looking for a

> pear, the jury could infer that in passing over the lawn, although not invited, she was not there unlawfully so far as the defendant was concerned and could recover for its negligence."

(c) and, finally, the very idea of the compensation laws is to do away with the whole theory of negligence and tort law, including the theories of trespassers, licensees, invitees, fellow-servants, etc., and instead to substitute an entirely different theory of law—a theory which

> "rests upon the idea of status, not upon that of implied contract. * * * The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment, because of and in the course of which he has been injured * * * it is enough if there be a casual connection between the injury and the business." The Parramore case, *supra*, at p. 423.

So the only question is one of casual connection. Talk of trespass only beclouds the issue, and is a veiled attempt to insert into the compensation law the old discarded principles of the tort law. That Giles might have taken a longer, safer route is only another way of saying he was contributorily negligent; and here, again, we are attempting to resurrect a theory which was discarded when the Utah compensation statute replaced the old master-servant laws;

(5) and, furthermore, many of our State courts refuse to distinguish between an injury caused by a

train at a regular crossing and one caused at a non-public crossing. Thus in Procaccino *vs.* E. Horton & Sons, *supra*, the employee was crossing over private property when hit and killed by a train. Curtis, J., speaking for the court, says at p. 412:

> "When this employee, under the facts found, entered the private property lying between Main Street and the defendant's plant, he came within the zone of his employment, and all dangers and perils incident to the use of this method of approach were perils incident to and arising out of his employment.
>
> "It does not render the dangers of this contemplated method of approach any less an incident of the decedent's employment, that there existed a method of approach by way of the Warehouse Point highway which would permit him to cross the railroad tracks on a highway. This method of approach for persons in the situation of the decedent was highly inconvenient, and it was not contemplated by the defendant that the employee should ordinarily use it."

See—

1 Honnold on Workmen's Compensation, sec. 109, p. 368 *et seq.*, and cases there cited.

Papineau *v.* Industrial Accident Commission, 187 Pac., 108.

Judson Mfg. Co. *v.* Industrial Accident Commission, 181 Cal., 390.

Starr Piano Co. *v.* Industrial Accident Commission, 181 Cal., 433.

Moore *v.* Manchester Liners, Ltd., 3 B. W. C. C., 527.

Cf.—

Longhurst *v.* John Stewart & Son, Ltd. (1916), 2 K. B., 803.

The fact that the employee was about thirty feet (R., p. 48) from the employers' premises when he was killed, clearly indicates that it was but a matter of seconds before he would have been within the plant. He was on his direct route to work and within the zone of his employment. In the words of the Parramore case, *supra*, at p. 426.

> "We attach no importance to the fact that the accident happened a few minutes before the time Parramore was to begin work, and was therefore, to that extent, outside the specified hours of employment. The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose."

The court also points out that as the railroad was immediately adjacent to the plant and connected by switches, "in principle it was as though upon the actual premises of the employer."

In view of the facts and circumstances peculiar to this case, it is submitted that the State Supreme Court rightfully found a causal connection between the employment and the accident, and hence there can be no violation of the due-process of law clause, or the equal

protection clause. There is and can be no constitutional objection, and the judgment of the Supreme Court of the State of Utah should be affirmed.

Conclusion.

The case at bar is, for all practical purposes, identical with the Parramore case. The distinction between a public crossing and a private crossing over a railway does not alter the causal relation between the accident and the employment; and where causal relation is established, there is no violation of the Fourteenth Amendment. It is not the duty of this Court to construe the Utah statute; that the Utah Court has done. And to the rational mind, there appearing a definite causal connection between Giles' accident and his work, by virtue of the location of the plant and the surrounding circumstances, it is submitted that it is the duty of this Court to affirm the judgment of the Supreme Court of the State of Utah.

Respectfully submitted,

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